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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960 1961

No. ~~326~~ 52

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, APPELLANT,

vs.

EGAN, GOVERNOR OF ALASKA, ET AL.

No. ~~327~~ 63

ORGANIZED VILLAGE OF KAKE, ET AL., APPELLANTS,

vs.

EGAN, GOVERNOR OF ALASKA.

APPEALS FROM THE DISTRICT COURT OF THE STATE OF ALASKA

FILED AUGUST 20, 1959

JURISDICTION POSTPONED DECEMBER 7, 1959

Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. ~~326~~ 5

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, APPELLANT,

vs.

EGAN, GOVERNOR OF ALASKA, ET AL.

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APPEALS FROM THE DISTRICT COURT OF THE STATE OF ALASKA

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[fol. 1]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8066-A

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, Plaintiff,

vs.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, Defendants.

NOTICE OF APPEAL

I. Notice Is Hereby Given that the Metlakatla Indian Community, Annette Island Reserve, A Federally Chartered Corporation, Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the District Court for the State of Alaska, Division Number One, Juneau, Alaska, entered July 2, 1959, dismissing the complaint filed by the Appellant.

This appeal is taken pursuant to 28 USC 1257 (1) and (2).

[fol. 2] II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint filed by Metlakatla Indian Community, Annette Island Reserve, with affidavits of William Coyne, Raymond V. Haldane, Henry J. Duncan, and Henry S. Littlefield attached.
2. Motion for Preliminary Injunction filed by Metlakatla Indian Community, Annette Island Reserve.

3. Motion to Dismiss Complaint filed by Appellee William A. Egan against Metlakatla Indian Community, Annette Island Reserve.

4. Affidavit of Walter Kirkness filed by Appellee, William A. Egan, in the consolidated companion cases of Kake and Angoon v. Egan, Nos. 8063-A and 8064-A, which affidavit was herein incorporated by stipulation in open Court.

5. Affidavits of Haakan Friele and Clarence D. Payne, filed by the Organized Villages of Kake and Angoon in the consolidated companion cases of those villages against Egan, No. 8063-A and 8064-A, which affidavits were herein incorporated by stipulation in open Court.

6. Brief of Appellant, Metlakatla Indian Community, Annette Island Reserve, filed in support of Complaint.

7. Brief of Appellee, William A. Egan, filed in support of Motion to Dismiss Complaint.

8. Affidavits of Alf Erickson, Neil Grant, Harold Martindale, William E. Smith, and Andy Wikan, filed by Appellee, William A. Egan, in the consolidated companion cases of Kake and Angoon v. Egan, Nos. 8063-A and 8064-A, which affidavits were herein incorporated by stipulation in open Court.

9. Reporter's transcript of proceedings of June 29, 1959, relating to assumption of jurisdiction by District Court as a State Court.

[fol. 3] 10. Reporter's transcript of record of proceedings on July 1, 1959, containing Appellant's oral notice of appeal.

11. Opinion rendered by the Court on July 1, 1959.

12. Motion for preliminary injunction pending appeal filed by Metlakatla Indian Community, Annette Island Reserve.

13. Order of Court denying motion for injunction pending appeal.

14. Supplemental findings of fact entered by Court on July 2, 1959.

15. Judgment of dismissal of the complaint of Metlakatla Indian Community, Annette Island Reserve, entered July 2, 1959.

III. The following questions are presented by this appeal:

1. Is all authority to administer and manage the fish and wildlife resources of Alaska for the year 1959 reserved to the Federal Government by the terms of Section 6 (e) of the Alaska Statehood Act, 72 Stat. 339, so as to make the Alaska criminal statutes, 17 SLA 1959 as amended by 95 SLA 1959, unenforceable against the appellant by the State and its officials, and so as to make the regulations issued by the Secretary of the Interior (24 FR 2053 et seq.) March 7, 1959, allowing appellant to fish the trap sites therein designated a valid exercise of that authority?

2. If Section 6 (e) of the Alaska Statehood Act, 72 Stat. 339, does purport to reserve such control to the Federal Government and thereby render inapplicable the Alaska criminal statutes, does Section 6 (e) violate the "equal footing" doctrine governing the admission of new States to the Union?

3. Does the Alaska Statehood Act, 72 Stat. 339, in Section 4 thereof and in its adoption and ratification of the Alaska Constitution (in this instance specifically Article XII, Section 12 thereof) comprehend a permanent disclaimer by the State of Alaska of control over Indian fishing within the State, and if so, is Section 4 of the Statehood Act an assumption of permanent jurisdiction (subject to further act of Congress) by the Federal Government over the location and manner of Indian fishing within the State, and further are the [fol. 4] regulations issued by the Secretary of the Interior (24 FR 2053 et seq.) March 7, 1959, allowing Appellant to fish the trap sites therein designated a valid exercise of that authority?

4. If the Alaska Statehood Act does so comprehend a permanent disclaimer by the State of Alaska and a permanent assumption of jurisdiction by the Federal Government, does it violate the "equal footing" doctrine governing the admission of new States to the Union?

5. Is the Alaska Statehood Act Congressional action of such a type, solely by virtue of its passage, as held by the District Court, that would eliminate and abolish that portion of the Annette Island Reserve (3000 feet of water surrounding the Island Reserve and the tidelands underlying said waters) which was established by Act of Congress (48 USC 358) in 1891, and vest title thereto, and the ownership thereof, in the State of Alaska?

6. Does the Secretary of the Interior derive his power to authorize reservation wards to fish on their reservation with designated gear and designated locations pursuant to the provisions of the White Act (48 USC Section 221), as was held by the District Court, or does the Secretary of the Interior derive such powers from the Act of Congress establishing the Annette Island Reserve which entrusted to him the powers and duties of administering said wards (48 USC Section 358)?

7. Did the lower Court err in inferentially holding that the Annette Island Reserve was not "Indian country" as defined in 18 USC Section 1151, and that, therefore, the provisions of 18 USC Section 1162 (1) were not applicable to the State of Alaska, and (2) Alaska could control and regulate by means of criminal prosecution, the fishing of the Indian wards within the boundaries of the Annette Island Reserve?

....., Of Counsel for Metlakatla Indian Community, Annette Island Reserve, Box 1079, Ketchikan, Appellant.

[fol. 5] Proof of Service (omitted in printing).

[fol. 6]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8066-A

[Title omitted]

COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff, for cause of action against defendants herein, alleges:

I

This is an action for injunctive relief brought pursuant to Rule 65 of the Federal Rules of Civil Procedure.

II

That plaintiff herein is a federally chartered corporation, organized and existing under the laws of the United States and is qualified to bring suit and to be sued in courts of competent jurisdiction.

[fol. 7] (a) The original Tsimpsean Indians migrated in 1886 from British Columbia to the site of the present day Metlakatla Indian Community, located on Annette Island, Alaska. The emigration and settlement of these peoples were not only acquiesced in, but encouraged by, executive and administrative officers of the United States. The Metlakatla Indian Community prospered in its reserve; native born Alaskan Indians joined the original settlers, acquiring all the right and privileges of the original emigrants. Today the town has a population of approximately 1,000 inhabitants. The townsite is divided into streets and alleys, blocks, and lots for residential and commercial purposes. Title to the structures thereon is vested in the individual owners thereof, but title in fee, not only to the townsite, but also to all the lands within the reservation are held in trust for the members of the Metlakatla Indian Community by the United States. There are churches, homes and

stores; in general, Metlakatla bears a resemblance to any other small town in Alaska. It owns and operates for the benefit of the community the Annette Island Canning Company, and its economy is based almost entirely upon its fishery resources.

[fol. 8] (b) By Act of Congress of March 3, 1891, (Title 48, U.S.C.A., Section 358), the present day Annette Island reserve was established. The Act provided as follows:

"Until otherwise provided by law, the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska on the North side of Dixon's Entrance, is set apart as a reservation for the use of the Metlakatla Indians, and those people known as Metlakatlans, who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

(c) On June 25, 1915, pursuant to the provisions of the Act creating the Annette Islands reserve, the Secretary of the Interior, for the first time, prescribed certain rules and regulations for the government of Metlakatla Indians and other Alaska Indians residing there.

(d) On February 11, 1915, the Secretary of the Interior ruled and ordered that permits could be issued to natives of Metlakatla to erect salmon traps on the shores of Annette Island, and for other purposes. The pertinent part of the order stated "That, until otherwise ordered by the Secretary of the Interior, natives or associations of natives of Metlakatla who [fol. 9] have secured the approval of the Council of the Annette Islands reserve be given permits by the Secretary of the Interior to erect salmon traps on the shores of Annette Island".

(e) The Annette Islands reserve was increased to include the waters within three thousand (3000) feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island, and the adjacent rocks and islets and also the bays of said Islands, rocks and islets. The inclusion of the waters to a distance of 3000 feet from the shore at mean low tide, as aforesaid, was accomplished by Presidential Proclamation No. 1332, signed and issued on April 28, 1916. The proclamation was issued by virtue of the authority contained in Title 43, U.S.C.A., Section 141. The reasons for thus including these waters, as stated in said proclamation, were that the Secretary of the Interior, in order to assist the Metlakatlans to become self-supporting, had decided to place in operation a cannery on Annette Island, and that to preserve a supply of fish and other aquatic products for the cannery it was necessary to establish an exclusive fishery for the Metlakatlans. To buttress the manifest intent of the President of the United States, the proclamation [fol. 10] added, "Warning is hereby given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned."

(f) The legal position has always been taken, since the reserve was created, that the traps and cannery are instrumentalities of the United States provided by the United States on the Annette Island reserve for the betterment of the Indian inhabitants thereof.

(g) The relation of guardian and ward exists between the United States and the Metlakatla Indians; it is the duty of the United States to preserve and protect the rights of the Metlakatla Indians through the courts; the Secretary of the Interior, by virtue of the statute of March 3, 1891, as well as by virtue of his general supervisory power over the Indian people who are wards of the nation, is authorized to enact and promulgate such regulations and restrictions as may promote their welfare; the power thus

given the Secretary of the Interior was, and is, a continuing power.

(h) In 1953, Congress enacted Chapter 29, Title 43, U.S.C.A., the "Submerged Lands" Act, under the provisions of which, the several states were, generally speaking, vested with title and ownership to the lands beneath navigable waters within their respective boundaries. The Act contained two significant exceptions found in Section 1313, designated respectively [fol. 11] as (a) and (b):

(a) "all tracts or parcels of land together with accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under any claim of right.

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians;"

(i) The Alaskan Admission Act, Public Law 85-508, Section 4 thereof, provides:

"As a compact with the United States, said state and its people do agree and declare that they forever disclaim all right and title to any lands or other

property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives), or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and [fol. 12] remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation:"

It seems apparent that not only does the United States hold title in fee to the Annette Islands reserve, including the waters to a distance of 3000 feet from the shore at mean low tide, but it also further appears that the State of Alaska has forever specifically disclaimed all right and title to lands and property the right or title to which is held by the United States or is subject to disposition by the United States, or which lands or property are held by the United States in trust, as is the case here, for Indians, which trust includes an exclusive fishery for the Metlakatla Indians.

(j) On March 7, 1959, by order found in Section 115.26, 24 Fed. Reg., page 2069, the Secretary of the Interior authorized the Metlakatla Indian Community to install and operate the hereinafter described traps at the designated locations for the 1959 salmon fishing season:

(1) Annette No. 3, located at 55°02′47″ North lat., 131°38′53″ West long.

(2) Annette No. 4, located at 55°05′41″ North lat., 131°19′31″ West long.

(3) Annette No. 6, located at 55°00′45″ North lat., 131°38′30″ West long., and

(4) Annette No. 8, located at 55°10′13″ North lat., 131°19′31″ West long..

[fol. 13] The trap sites above enumerated are all wholly within the waters of the Annette Islands reserve, as created by the laws of the United States.

III

This action involves questions under the laws of the United States, including, but not necessarily limited to, those enumerated in Paragraph II hereof, and the laws of the State of Alaska, including, but not necessarily limited to, Chapters 17 and 94, SLA, 1959; the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00 and diversity of citizenship exists between the parties; more important, a substantial federation question is hereby raised and herein presented.

IV

When the aforementioned order was issued by the Secretary of the Interior on March 7, 1959, plaintiff began preparing traps for installation at the designated trap sites. The approximate cost to plaintiff by the time the traps are ready for setting, to-wit: July 6, 1959, will be in excess of $50,000.00. More than $35,000.00 had been expended in preseason preparatory work by plaintiff on its traps before the defendants advised plaintiff, on or about May 25, 1959, that the defendants intended to eliminate all fish traps from Alaskan waters, the laws of the United States and regulations of the Secretary of the Interior to the contrary notwithstanding. To curtail trap operations at this late date would result in an approximate loss to plaintiff, including moneys already disbursed, of almost $64,500.00.

[fol. 14] V

Plaintiff packed 68,700 cases of salmon in 1958, 25,763 cases of which were directly attributable to its trap-caught fish. The production cost of the seasonal operation was

$1,022,387.79. The market value of the total 1958 pack, after selling expenses, was $1,326,959.91. Sworn affidavits filed herewith and made a part hereof conclusively show that, had it not been for the supply of trap-caught fish, plaintiff's 1958 operation would have resulted in an approximate loss of $65,279.88. The profit on the total pack for 1958 was $253,106.38; without its trap-caught fish, plaintiff would have sustained a net loss in excess of $318,000.00.

VI

Plaintiff derives almost all of its seasonal pack from trap-caught fish and fish caught by seine vessels. If the right of plaintiff to utilize its fish traps is abolished, the supply of fish for plaintiff's cannery will be eliminated or so substantially diminished as to imperil the operation thereof for 1959, and necessitate the abandonment thereof for subsequent years. The investment in trap gear and related equipment will be rendered useless for 1959, and will have little salvage value. The catch of seine vessels or other mobile gear is already fully utilized, and no substantial increase in catch from these sources can be expected with which to replace lost trap production.

VII

As is conclusively shown by sworn affidavits herewith filed, plaintiff, over the last seven years of its operations, could not have operated profitably without its trap-caught fish; indeed, had it not been for the supply of fish provided [fol. 15] by the Metlakatla traps in past years, the canning operation would have been abandoned by plaintiff before 1959.

VIII

The Metlakatla Indians are a seafaring people who have always turned to the sea for their livelihood. The economy of the community depends upon its annual fishing endeavor. If the cannery were to be prohibited from operating by the curtailment of its supply of trap-caught fish, members of the community who now make their only annual wages in the cannery would be impoverished. The seasonal can-

nery payroll, in excess of $100,000.00, would be forever lost unto them. Moneys thus earned are spent during the winter months for food, clothing and other necessities of life. If these cannery wages were to be eliminated, there would be no other work available on the Annette Island reserve. The community would become economically dormant, its people would disperse, they would necessarily lose the self-supporting status they have achieved, public welfare rolls would swell, and the very purposes for which the Congress of the United States created the Annette Islands reserve would be circumvented and defeated.

IX

Plaintiff has pledged a substantial part of the earnings derived from its salmon cannery operation to the United States to retire loans aggregating almost $1,800,000.00. Without trap caught fish, as aforesaid, the cannery cannot be operated profitably; hence, abolition of the plaintiff's traps will necessarily cause it to default on its loan obligations; these allegations are supported by sworn affidavits herewith filed and made a part hereof.

[fol. 16] X

Chapters 17 and 94, SLA 1959, are unconstitutional and invalid in that they are in derogation of, and in direct conflict with, the applicable federal laws as set forth in Paragraph II hereof. Section 1 of Chapter 17, SLA 1959, provides for the imposition of fines and/or imprisonment upon those who violate the provisions of the Act. To violate the Act, all one has to do is "erect, moor or maintain fish traps, on or over lands or tidelands owned or hereafter acquired by the State of Alaska." Under the provisions of Chapter 94, SLA 1959, although, to the plaintiff's knowledge, such has not been done yet, the Board of Fish and Game has power to enact rules or regulations having the force of law, a violation of which would result in fines and/or imprisonment, as well as confiscation of plaintiff's gear.

XI

Defendants have threatened publicly, on several occasions, to invoke "the police power of the State" in order to eliminate fish traps and to prohibit their operation from and in the coastal waters of Alaska within the Annette Islands reserve; the defendant Governor of the State has also stated publicly, as recently as June 13, 1959, at Metlakatla, Alaska, that he was "sworn to uphold the constitution and laws of the State of Alaska" and that "the State Government would neither hesitate nor waver in its obligation to enforce the law." Defendants have likewise threatened to invade plaintiff's reservation to enforce State laws (see affidavits herewith filed and made a part hereof). These threats are not idle in nature, but have been made with deliberate intent and purpose. Prosecution is imminent and immediate, and, if these threats are carried out, plaintiff will sustain exceptional and irreparable in- [fol. 17] jury, if as a result thereof, use of its fish traps are prohibited or said traps are confiscated.

VII

Plaintiff is informed, fears and believes that defendants will seek to enforce the criminal provisions of Section 1 of Chapter 17, SLA 1959, or rules and regulations promulgated by the Board of Fish and Game pursuant to the provisions of Chapter 94, SLA 1959. Arrests of natives of other communities engaged in pre-season work on floating fish traps have already been made and one trap seized, as recently as June 17, 1959, and those natives are now awaiting arraignment and prosecution. Defendants at present have two vessels near trap sites at Kake and Angoon, both native villages in Southeastern Alaska, which vessels are manned by fully armed State Police. Defendants, unless restrained and enjoined from so doing, will carry out their threats to cause like arrests to be made of the plaintiff's members, and its traps, nets, gear, etc., confiscated, all of which would constitute grievous, immediate and irreparable loss and injury to plaintiff and its members; these allegations are supported by sworn affidavits filed herewith and made a part hereof.

VIII

Plaintiff has no plain, speedy and adequate remedy at law to challenge the constitutionality and validity of State laws for the reason that time is of the essence, and were the determination of the rights of the parties to be adjudicated on the basis of criminal prosecutions, both pending and threatened, the 1959 trap-caught fish would necessarily be lost irretrievably by the plaintiff. Furthermore, plaintiff would be without a speedy, plain and adequate [fol. 18] remedy of law in any event, inasmuch as State law prohibits an action against the State for damages if the claim for which damages are sought is predicated upon the acts of agents or employees of the State of Alaska, the doing of which acts has been exercised in the execution of State statutes or regulations, irrespective of the validity or invalidity thereof.

XIV

The action threatened by the defendants violates, and is repugnant to, the laws of the United States and the Constitution of the State of Alaska in that not only is the State attempting to encroach upon and eliminate federal instrumentalities, but it also threatens to act in violation of the following:

1. The laws of the United States of America prevent the State of Alaska, or any officer or agent thereof, from exercising any control over the supervision and management of the fish and wild life in Alaska at this time (see Section 6 (e) Statehood Act, 72 Stat. 339).

2. The laws of the United States of America (Section 4, Statehood Act, Section 4, 72 Stat. 339) and the Constitution of the State of Alaska (Article XII, Section 12) prevent the State of Alaska from interfering with the control and management of Indian fishing rights held either by Indians or held by the United States of America in trust for Indians, at any time, now or in the future.

3. The regulations issued by the Secretary of the In- [fol. 19] terior (24 Fed. Reg., 2053 et seq.), on March 7, 1959, allowing the plaintiff to operate and utilize four fish traps at the sites noted hereinabove constitute an exercise by the United States of its exclusive power both over the whole Alaska fisheries and over the fishing rights of Indians.

4. The Commerce Clause of the Constitution of the United States of America places the regulation of the social and economic welfare of Indians exclusively within the power of Congress of the United States, as well as that of the fish and wild life resources of the United States.

5. That the statute under which the defendants claim their authority (17 SLA 1959), the claim of Constitutional mandate (Ordinance No. 3), and the general claim of police power are all repugnant to the principles and laws above stated and therefore are in violation of the laws of the United States, the Constitution of Alaska, and the Constitution of the United States of America; they are, therefore, unconstitutional, invalid, void and of no force and effect.

XV

That in recent weeks public interest in the controversy has mounted. Isolated outbreaks of violence have already taken place and it is feared that if the situation is allowed to continue without a determination of the rights of the [fol. 20] parties immediately that violence will increase; especially is this true if the State officials adhere to their manifested and announced course of action to invade the plaintiff's reservation and to enforce invalid and unconstitutional State laws, rules and regulations. The public interest and welfare could best be served by an immediate hearing on the question of the aforementioned rights.

XVI

By way of recapitulation, and as hereinabove set forth, plaintiff is without a plain, speedy and adequate remedy at

law to have the constitutionality of defendants' acts determined; plaintiff contends that the laws of Alaska are unconstitutional and invalid as applied to it or its members, because of its reservation status and the applicable laws involved; plaintiff will suffer immediate, exceptional and irreparable loss, damage or injury if the defendants, their officials, agencies, employees and servants are not restrained and enjoined from trespassing on plaintiff's lands or waters, and restrained and enjoined from enforcing, or attempting to enforce, unconstitutional and invalid State laws.

Wherefore, Plaintiff prays that the Court herein issue a temporary restraining order restraining the defendants, their officials, agencies, employees and servants from committing any act of trespass upon plaintiff's reservation, held in trust for it and its members by the United States of America; that defendants, their officials, agencies, employees and servants be restrained from enforcing or [fol. 21] attempting to enforce any of the laws of the State of Alaska which allegedly gives the defendants the right so to invade plaintiff's reservation, and to arrest, fine and/or imprison, and confiscate; plaintiff further prays that defendants be ordered forthwith to appear before this Honorable Court to show cause, if any such there be, on a date to be fixed by this Court, why preliminary injunctions should not be issued against the defendants enjoining their officials, agencies, employees and servants from invading plaintiff's reservation, held for it and its members in trust by the United States of America, and enjoining defendants, their officials, agencies, employees and servants from enforcing, or attempting to enforce, unconstitutional and invalid State laws, rules or regulations; plaintiff further prays that upon trial of this cause the Court issue its permanent injunction enjoining the defendants, their officials, agencies, employees and servants from trespassing upon or invading plaintiff's reservation, held for it and its members in trust by the United States of America, and that the defendants, their officials, agencies, employees and servants be enjoined from enforcing or attempting to enforce, unconstitutional and invalid State laws, rules or regulations, or in anywise interfering with plaintiff's exclusive fishery rights.

Plaintiff further prays the Court that, as applied to it, Chapter 17, SLA 1959, Ordinance No. 3 of the Constitution of the State of Alaska and all other laws of the State of Alaska relied upon by defendants as authority for their interference with plaintiff's fishery rights, be adjudicated unconstitutional, invalid, void and of no force and effect.
[fol. 22] Dated at Juneau, Alaska, this 23rd day of June, 1959.

Ziegler, Ziegler & Cloudy, Counsel for plaintiff.

Duly sworn to by Henry S. Littlefield, jurat omitted in printing.

[fol. 23]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8066-A

[Title omitted]

AFFIDAVIT OF WILLIAM COYNE

State of Alaska)
First Judicial Division) ss:

William Coyne, being first duly sworn, on oath, deposes and says as follows:

I am the Manager of the Annette Island Canning Company which is owned and operated by the Metlakatla Indian Community. I have served in this capacity since the late 1940's and am thoroughly familiar with the canning operation and its economy upon Metlakatla and the inhabitants thereof.
[fol. 24] As Manager of the Annette Island Canning Company, employed as such by the Council Annette Islands Reserve, and in connection with the 1959 operation, I did not follow my usual procedure of ordering trap supplies and equipment at the conclusion of the 1958 season, or in the subsequent winter months, because of the uncertain

condition of the status of fish traps. However, in early March of this year, the Secretary of the Interior authorized Metlakatla to fish four traps during the 1959 season, and pursuant to this order, I proceeded with pre-seasonal preparations. To date we have spent approximately $50,000.00 of cannery funds in this work and by July 13, 1959, the date of the season opening, we will by then owe approximately another $50,000.00 for a total of $100,000.00. Undersecretary of the Interior, Elmer Bennett, advised the Area Director for the Bureau of Indian Affairs, under date of March 10, 1959, as follows:

> "As you know, under section 4 of the act of July 7, 1958 (72 Stat. 339), the State of Alaska disclaimed jurisdiction over any lands or other property, including fishing rights, held by any Indians, Eskimos, or Aleuts, or which is held by the United States in trust for them, and recognized continuing federal authority thereover. This disclaimer, coupled with the long-standing supervisory control exercised for the protection of the interests of Indians, Eskimos and Aleuts by the Department of the Interior, accounts for the provision that the proposed regulations will not eliminate operation of the fish traps by Indian tribes or villages. The Secretary will continue to control the operation of traps by Indian tribes and villages.
>
> The Angoon Community Association, the Organized Village of Kake, and the Metlakatla Indian Community, may proceed to make plans for operation of their salmon canneries in 1959 on the basis that they will be permitted to continue to operate the number of fish traps consistent with proper conservation practices recommended by this Department."

The canned salmon business in Alaska involves an unusually high percentage of fixed costs as compared to other industries in and out of Alaska. Even direct canning labor is a fixed item of cost; that is, it does not vary with volume of production. This is so because of the seasonal guarantees paid to most all workers. The guaranteed sum is the same, regardless of the hours worked or the number of cases

produced. Cans, cartons, and southbound shipping costs are the only major items of cost that vary directly with the volume produced.

In such a situation, the number of cases that can be put through a plant has a decided bearing on the per case production costs. In fact, the maintenance of high volume may be said to be the "key" to successful operation. The elimination of traps from the Annette operation would, of [fol. 25] course, reduce the potential volume of fish available for canning. The question here is what effect would the reduced volume have on the financial results of the operation, and that is answerable only by reference to prior year's results adjusted for an assumed elimination of trap volume.

The approach adopted in the accompanying analytical schedules is to start with the known results of prior years operations as recorded in financial statements audited by Ernst & Ernst, C.P.A.s. Then to eliminate the sales value, production costs, administrative expenses and the profit or loss attributable to cases of salmon produced from the trap catch. The remaining sales and costs after this elimination are then attributable to cases produced from the seine catch and the resulting profits or losses can be calculated.

The problem could also be solved by analyzing and classifying all expense items as to fixed and variable costs, and then apportioning the fixed costs to the smaller volume of seine catch alone. The same results would be obtained, but the figures and calculations would not be so readily traceable to the audited financial statements.

The accompanying schedules contain full details of the items attributable to trap case production, the elimination thereof, and the calculated results. It may, however, be helpful to point out and comment on a few of the major items:

1. The *net sales values* of trap cases is obtained by multiplying the known trap cases by specie by the average sales price by specie, and deducting the per case selling expenses multiplied by the known cases—see Schedule "B".

2. The *direct trap costs* are all eliminated—see Schedule "B".

3. *Cans, cartons, salt and shipping costs* are eliminated on a direct per case basis (unit cost × trap cases).

4. *Labor*—It is assumed that had traps not operated, the operation would have been cut to one line, eliminating 34 employees. Labor cost is, therefore, reduced by 34 × the seasonal guarantee paid in each year.

5. The elimination for cannery overhead includes the depreciation on trap equipment, and the other smaller items detailed on schedule "C". Except for depreciation, it was necessary to estimate the amounts involved.

6. The elimination from *administrative expense* includes association dues on an actual per case basis, and an estimate of interest savings resulting from less volume to finance.

[fol. 26] The eliminations for production costs attributable to trap case production are probably higher than actual. The labor elimination, for example, assumes elimination of one full line and does not allow for overtime in excess of guarantees that might result from canning on only one line. It is believed, therefore, that the losses from the hypothetical trap elimination are definitely not overstated and may possibly be understated.

The accompanying schedules include:

"A"—A summary of effect of trap production on operations—showing losses, increased costs, and a breakdown of the losses resulting from increased costs and from lost profits.

The total loss consists of the difference between the actual profit or loss and the calculated profit or loss had traps not operated. For example, in 1958 Metlakatla would have had a $65,279.88 loss instead of the actual $253,106.38 profit. So the total loss to Metlakatla would have been $318,-386.26.

"B"—A summary of the calculations, supports schedule A.

"C"—Detail of cost reductions that could be made if the traps were not operated. Supports various totals used in schedule B.

"D"—Pack and sales statistics, showing detailed calculation of the sales value of cases produced from trap fish. Supports schedule C.

It is my considered opinion that if Metlakatla is deprived of its trap-caught production, economic reality will compel, necessarily, the complete curtailment of the cannery operation at Metlakatla with these results:

1. The cannery buildings will deteriorate and be forever lost to Metlakatla.
2. The community will lose its primary and almost its sole source of income.
3. Metlakatla will be forced to default on its loan obligations.
4. The Metlakatla Indian Community will wither and die; it cannot exist without the cannery, and the [fol. 27] cannery cannot operate without enough fish to make the operation profitable; only by the utilization of traps will there be sufficient production to make the seasonal operation pay.

Dated at Ketchikan, Alaska, this 19th day of June, 1959.

William Coyne

Subscribed and sworn to before me this 19th day of June, 1959.

Ruth E. Brown, Notary Public for Alaska, My Commission expires: 9/18/60.

[fol. 27a]

SCHEDULE "A" TO AFFIDAVIT

(See Opposite) ☞

Schedule "A" to Affidavit

SUMMARY OF
EFFECT OF TRAP PRODUCTION ON OPER
Annette Islands Canning Co.

June 15, 1959

	1952 - 1958	
	1958	195
Net profit or (loss) that would have resulted if traps had not operated	($ 65,279.88)	($ 24,1
Actual profit or (loss) that resulted with traps	253,106.38	34,4
Total unrecovered overhead and profits that Metlakatla would have lost if traps had not operated	($318,386.26)	($ 58,6
Packs - 48/1# Cases		
Trap	25,763	8,3
Seine	42,937	45,0
TOTAL	68,700	53,3
Increase in per case production costs without trap volume	$ 4.81	$
Increase in production costs without trap volume (seine cases x cost increase)	$206,526.97	$ 35,1
Profit on sale of trap cases	111,859.29	23,5
TOTAL LOSS	$318,386.26	$ 58,6

NOTES:

1. The two years 1954 and 1958 are considered p
1956 was a fair year. 1957 and 1955 were po
and 1952 and 1953 were loss years. This pe
therefore, representative of all conditions.

2. The increased volume provided by traps was
effective both in increasing profits (see 1958)
in reducing losses (see 1952).

Affidavit

OF
ION ON OPERATIONS
nning Co.

58

	1957	1956	1955	1954	1953	1952	Seven Year Total	Seven Year Average
.88)	($ 24,154.98)	($ 63,999.70)	($ 15,640.00)	$ 55,907.06	($124,049.18)	($194,865.57)	($ 432,082.25)	($ 61,726.04)
.38	34,478.03	106,496.85	10,990.44	347,803.09	(116,325.56)	(33,509.64)	603,039.59	86,148.51
.26)	($ 58,633.01)	($170,496.55)	($ 26,630.44)	($291.896.03)	($ 7,723.62)	($161,355.93)	($1,035,121.84)	($147,874.55)
	8,308	13,845	5,793	22,390	10,051	19,327	105,477	15,068
	45,030	49,627	31,095	52,547	39,932	26,806	287,974	41,139
	53,338	63,472	36,888	74,937	49,983	46,133	393,451	56,207
.81	$ .78	$ 2.55	$ .58	$ 2.64	$ .09	5.33		
.97	$ 35,123.40	$126,548.85	$ 18,035.10	$138,724.08	$ 3,593.88	$142,875.98	$671,428.26	$ 95,918.32
.29	23,509.61	43,947.70	8,595.34	153,171.95	4,129.74	18,479.95	363,693.58	51,956.23
.26	$ 58,633.01	$170,496.55	$ 26,630.44	$291,896.03	$ 7,723.62	$161,355.93	$1,035,121.84	$147,874.55

e considered good years.
1955 were poor years,
ars. This period is,
conditions.

by traps was highly
fits (see 1958) and

[fol. 27b]

SCHEDULE "B" TO AFFIDAVIT

(See Opposite) ☞

Schedule "B" to Affidavit

EFFECT OF TRAP PRODUCTION ON OPERATIONS
SUMMARY OF CALCULATIONS
Annette Islands Canning Co.

June 15, 1959

	1958	1957	1956
Net sales less selling expenses	$1,326,959.91	$1,043,898.70	$1,295,091.90
Less trap fish	498,756.21	178,068.76	299,296.24
	$ 828,203.70	$ 865,829.94	$ 995,795.66
Production costs	$1,022,387.79	$ 983,467.84	$1,161,455.23
Less cost reductions if no traps	177,020.76	117,940.31	126,722.94
	$ 845,367.03	$ 865,527.53	$1,034,732.29
Gross Profit (loss) if no traps	($ 17,163.33)	$ 302.41	($ 336,936.63)
Administrative expense, interest, etc.	$ 51,465.74	$ 25,952.83	$ 27,130.92
Less cost reductions if no traps	3,349.19	1,495.44	2,078.75
	$ 42,116.55	$ 24,457.39	$ 25,063.07
Net profit (loss) if no traps	($ 65,279.88)	($ 24,154.95)	($ 63,999.70)
Net profit (loss) actual	253,106.38	24,478.03	106,496.85
Loss to Metlakatla	($ 318,386.26)	($ 58,633.01)	($ 170,496.55)
Pack			
Production costs - Seine fish	$ 845,387.03	$ 865,527.53	$1,034,732.29
Cost per case	19.69	19.22	20.85
Production costs - Seine & Trap fish	$1,022,387.79	$ 983,467.84	$1,161,455.23
Cost per case	14.86	18.44	18.30
Total cases	68,700	53,338	63,472
Trap fish - Cases	25,763	8,306	13,845
	42,937	45,030	49,627

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ON OPERATIONS
LATIONS
ng Co.

	1957	1956	1955	1954	1953	1952	Seven Year Total	Seven Year Average
91	$1,043,898.70	$1,295,091.90	$ 756,321.92	$1,308,840.88	$ 720,163.28	$ 721,208.80	$7,172,485.39	$1,024,640.77
21	178,068.76	299,296.24	122,978.16	435,673.31	169,564.75	327,474.00	2,031,812.43	290,258.92
70	$ 865,829.94	$ 995,795.66	$ 633,342.76	$ 873,167.57	$ 550,598.53	$ 393,734.80	$5,140,672.96	$ 734,381.85
79	$ 983,467.84	$1,161,455.23	$ 722,831.61	$ 935,422.67	$ 813,091.16	$ 734,219.91	$6,372,876.21	$ 910,410.89
76	117,940.31	126,722.94	95,363.91	$ 141,090.48	159,931.44	164,571.91	982,641.75	140,377.39
03	$ 865,527.53	$1,034,732.29	$ 627,467.70	$ 794,332.19	$ 653,159.72	$ 569,648.00	$5,390,234.46	$ 770,033.50
33)	$ 302.41	($ 336,936.63)	$ 5,875.06	$ 778,835.38	($ 102,561.19)	($ 175,013.20)	($ 249,561.50)	($ 35,651.64)
74	$ 25,952.83	$ 27,130.92	$ 22,499.87	$ 25,615.12	$ 23,397.68	$ 20,498.53	$ 196,569.59	$ 28,081.37
19	1,495.44	2,078.75	984.81	2,686.80	1,009.69	1,546.16	14,048.84	2,006.98
55	$ 24,457.39	$ 25,063.07	$ 21,515.06	$ 22,928.32	$ 21,487.99	$ 18,952.37	$ 182,520.75	$ 26,074.39
88)	($ 24,154.95)	($ 63,999.70)	($ 15,640.00)	$ 55,907.06	($ 124,049.18)	($ 194,855.57)	($ 432,082.25)	($ 61,726.04
38	24,478.03	106,496.85	10,990.44	347,803.09	(116,325.56)	(33,509.64)	603,039.59	86,148.51
26)	($ 58,633.01)	($ 170,496.55)	($ 26,630.44)	($ 291,896.03)	($ 7,723.62)	($ 161,355.93)	($1,035.121.84)	($ 147,876.55)
03	$ 865,527.53	$1,034,732.29	$ 627,467.70	$ 794,332.19	$ 653,159.72	$ 569,648.00	$5,390,234.46	$ 770,633.49
	19.22	20.85	20.18	15.12	16.36	21.25		
79	$ 983,467.84	$1,161,455.23	$ 722,831.61	$ 935,422.67	$ 813,091.16	$ 734,219.91	$6,372,876.21	$ 910,410.89
	18.44	18.30	19.60	12.48	18.27	15.92		
	53,338	63,472	36,888	74,937	49,983	48,133	393,451	56,207
	8,306	13,845	5,793	22,390	10,051	10,327	105,477	15,668
	45,030	49,627	31,095	52,547	39,932	26,806	287,974	41,139

[fol. 27c]

SCHEDULE "C" TO AFFIDAVIT

(See Opposite) ☞

Schedule "C" to Affidavit

COST REDUCTIONS IF NO TRAPS ARE OPERATED

June 15, 1959 SUPPORTING SCHEDULE "B"
Annette Islands Canning Co.

	1958	1957	1956
COST REDUCTIONS IF NO TRAPS DIRECT TRAP COSTS:			
Trap Construction Labor & Material	$ 37,875.69	$ 34,088.59	$ 34,658.87
Floating Equipment Costs	22,192.11	21,228.41	20,258.96
Trap Watchmen and Mess	9,880.19	7,148.67	8,819.96
Cans, Cartons, Salt	54,617.56	17,446.80	26,167.05
Labor - See below	19,094.00	18,360.00	14,688.00
Cannery Overhead - See below	16,100.00	14,600.00	14,100.00
Longshoring	515.26	249.20	553.80
Shipping Expenses - Cannery to Seattle	16,745.95	4,818.64	7,476.30
	$177,020.76	$117,940.31	$126,722.94
Administrative Expenses:			
Association Dues	2,061.04	996.98	1,384.50
Interest	1,288.15	498.48	692.25
	$ 3,349.19	$ 1,495.44	$ 2,076.75
CANNERY OVERHEAD REDUCTIONS			
Cannery Mess	1,000.00	1,000.00	1,000.00
Fuel Oil	400.00	400.00	400.00
Insurance	2,500.00	1,500.00	1,500.00
Transportation	500.00	450.00	450.00
Rubber clothing and Gloves	200.00	250.00	250.00
Depreciation	7,000.00	7,000.00	7,000.00
Miscellaneous Items	4,500.00	4,000.00	3,500.00
	$ 16,100.00	$ 14,600.00	$ 14,100.00
LABOR COST REDUCTIONS			
34 Employees x Seasonal Guarantee	17,680.00	17,000.00	13,600.00
Payroll Taxes and Insurance	1,414.00	1,360.00	1,088.00
	$ 19,094.00	$ 18,360.00	$ 14,688.00
Seasonal Guarantee	$ 520.00	$ 500.00	$ 400.00

Affidavit

APS ARE OPERATED

EDULE "B"

anning Co.

	1957	1956	1955	1954	1953	1952	Seven Year Total	Seven Year Average
6.69	$ 34,088.59	$ 34,658.87	$ 27,908.68	$ 31,100.89	$ 59,117.14	$ 47,785.64	$272,535.50	$38,933.64
2.11	21,228.41	20,258.96	19,175.51	22,214.27	36,867.31	35,839.23	177,775.80	25,396.54
0.19	7,148.67	8,819.96	8,088.52	8,938.12	14,546.79	11,526.18	66,948.43	9,564.06
7.56	17,446.80	26,167.05	10,601.19	38,063.00	16,634.66	31,696.28	195,276.54	27,896.65
4.00	18,360.00	14,688.00	14,688.00	14,688.00	14,688.00	14,688.00	110,894.00	15,842.00
0.00	14,600.00	14,100.00	13,600.00	13,100.00	12,600.00	12,600.00	96,700.00	13,814.29
6.26	249.20	553.80	231.72	1,119.50	502.55	773.08	3,945.11	563.59
6.95	4,818.64	7,476.30	3,070.29	11,866.70	4,924.99	9,663.50	58,566.37	8,366.62
0.76	$117,940.31	$126,722.94	$ 95,363.91	$141,090.48	$159,931.44	$164,571.91	$982,641.75	$140,377.39
1.04	996.98	1,384.50	695.16	1,791.20	804.08	1,352.89	9,085.83	1,297.97
8.15	498.48	692.25	289.65	895.60	1,105.61	193.27	4,963.01	709.00
9.19	$ 1,495.44	$ 2,076.75	$ 984.81	$ 2,686.80	$ 1,909.69	$ 1,546.16	$ 14,048.84	$ 2,006.97
0.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	7,000.00	1,000.00
0.00	400.00	400.00	400.00	400.00	400.00	400.00	2,800.00	400.00
0.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	11,500.00	1,642.86
0.00	450.00	450.00	450.00	450.00	450.00	450.00	3,200.00	457.14
0.00	250.00	250.00	250.00	250.00	250.00	250.00	1,700.00	242.86
0.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	49,000.00	7,000.00
0.00	4,000.00	3,500.00	3,000.00	2,500.00	2,000.00	2,000.00	21,500.00	3,071.43
0.00	$ 14,600.00	$ 14,100.00	$ 13,600.00	$ 13,100.00	$ 12,600.00	$ 12,600.00	$ 96,700.00	$ 13,814.29
0.00	17,000.00	13,600.00	$ 13,600.00	$ 13,600.00	$ 13,600.00	$ 13,600.00	$102,680.00	$ 14,668.57
4.00	1,360.00	1,088.00	1,088.00	1,088.00	1,088.00	1,088.00	8,214.00	1,173.43
4.00	$ 18,360.00	$ 14,688.00	$ 14,688.00	$ 14,688.00	$ 14,688.00	$ 14,688.00	$110,894.00	$ 15,842.00
0.00	$ 500.00	$ 400.00	$ 400.00	$ 400.00	$ 400.00	$ 400.00	$ 3,020.00	$ 431.43

[fol. 27d]

SCHEDULE "D" TO AFFIDAVIT

(See Opposite) ☞

Schedule "D" to Affidavit

PACK AND SALES STATISTICS

	1958	1957
AVERAGE SALES PRICE		
Pinks	20.50 to 21.00	23.00
Chums	16.75 to 17.00	18.00 to 19.00
Cohoes	27.00	26.00
Reds	32.00 to 33.00	32.00 to 33.00
PRODUCTION - TRAP AND SEINCE		
Pinks	43,168	27,913
Chums	18,550	21,394
Cohoes	1,512	1,366
Reds	3,335	2,665
	66,565	53,338
Other	2,135	
	68,700	
PRODUCTION - TRAPS ONLY		
Pinks	20,081	5,751
Chums	3,407	1,367
Cohoes	627	413
Reds	1,648	777
	25,763	8,308
SALES VALUE OF TRAP FISH		
Pinks	$ 416,680.75	$ 132,273.00
Chums	57,919.00	25,289.50
Cohoes	16,929.00	10,738.00
Reds	53,560.00	25,252.50
	$ 545,088.75	$ 193,553.00
Selling expense	46,332.54	15,484.24
Net sales value	$ 498,756.21	$ 178,068.76

Schedule "D" to Affidavit

PACK AND SALES STATISTICS

	1958	1957	1956	1955	1954	1953	1952
ES PRICE							
	20.50 to 21.00	23.00	23.00	22.00 to 23.00	20.00 to 22.00	18.00	18.00 to 20.00
	16.75 to 17.00	18.00 to 19.00	21.00	20.00	15 to 16	13.30 to 14.50	16.00
	27.00	26.00	29.00 to 30.00	27.00	24 to 25	19.50 to 21.00	21.00
	32.00 to 33.00	32.00 to 33.00	33.00	32.75	27.50	27.00	27.00
TRAP AND SEINCE							
	43,168	27,913	40,632	30,944	55,800	18,279	24,861
	18,550	21,394	20,437	3,956	15,848	27,644	19,242
	1,512	1,366	1,055	1,072	1,453	1,214	829
	3,335	2,665	1,348	916	1,836	2,846	1,201
	66,565	53,338	63,472	36,888	74,937	49,983	46,133
	2,135						
	68,700						
TRAPS ONLY							
	20,081	5,751	11,814	4,613	20,574	7,154	12,674
	3,407	1,367	985	498	954	1,520	5,527
	627	413	458	420	188	639	615
	1,648	777	583	262	674	738	511
	25,763	8,308	13,845	5,793	22,390	10,051	19,327
OF TRAP FISH							
	$ 416,680.75	$ 132,273.00	$ 271,722.00	$ 103,792.50	$ 432,054.00	$ 128,772.00	$ 240,806.00
	57,919.00	25,289.50	20,685.00	9,960.00	14,787.00	21,280.00	88,432.00
	16,929.00	10,738.00	13,511.00	11,340.00	4,606.00	12,939.75	12,915.00
	53,560.00	25,252.50	19,404.00	8,580.50	18,535.00	19,926.00	13,797.00
	$ 545,088.75	$ 193,553.00	$ 325,322.00	$ 133,673.00	$ 469,982.00	$ 182,917.75	$ 255,950.00
e	46,332.54	15,484.24	26,025.76	10,693.84	34,308.69	13,353.00	28,476.00
e	$ 498,756.21	$ 178,068.76	$ 299,296.24	$ 122,979.18	$ 435.673.31	$ 169,564.75	$ 327,474.00

[fol. 28]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8066-A

[Title omitted]

AFFIDAVIT OF RAYMOND V. HALDANE

State of Alaska)
First Judicial Division) ss:

Raymond V. Haldane, being first duly sworn, on oath, deposes and says as follows:

I am a member of the Metlakatla Indian Community and have been such for forty-seven years. I have served on the Council of the Annette Islands Reserve since 1934, and at the present time, I am the Assistant Secretary of that body.

The 1959 salmon fishing season is due to open on July 13, 1959. Preparatory work on the traps is being performed now and has been for quite some time. Some time [fol. 29] around the weekend of July 4th, we intend to start moving traps into location and setting them in order that they might be fully operable by July 13th. The Annette Island Canning Company, the Metlakatla community cannery, is dependent almost entirely upon trap-caught fish and seine boat fish production. These boats are owned by individual members of the community, the community owns some of them which it fishes on a share basis, and some of the boats are on a "purchase-option" basis. I know of my own experience that without the trap-caught production, our community cannery will be unable to operate profitably. We are this year, and have in past years, made full utilization of our seine boat production. No substantial increase in catch from boat sources can be expected with which to replace lost trap production. The argument has been made that if these traps are eliminated from our reservation waters that the seine boats will be able to catch more fish. This is a fallacious argument and is extremely unsound.

One of the reasons for my so stating is that, with the elimination of traps elsewhere in Alaska, "outside" seine boats are coming to Alaska in tremendous numbers and they will effectively eliminate any surplus fish which might be available by the elimination of our traps, although, I cannot subscribe to the theory that the absence of traps necessarily means a greater catch for seine boats.

The Annette Island Canning Company is maintained and operated exclusively for the benefit of the Metlakatlan people. Their economic welfare, to an unparalleled degree, depends exclusively upon the cannery operation.

At the present time, Metlakatla owes the Rural Electric Administration the sum of $1,578,781.59 (as of June 18, 1959). Interest on the principal amounts to approximately $26,000.00 annually. Under the terms of our repayment schedule with the REA, we pay approximately $15,000.00 to $16,000.00 quarterly which includes interest. Under the terms of our loan with the REA, the first $75,000.00 of profits which are available are retained by the community. The next $72,000.00 must be paid to the REA. The excess profits, if any, are given to the community which, in turn, gives most of the excess to the Bureau of Indian Affairs and the United States Treasury where it is held in trust for the community. The Council, when it desires access to the funds thus held for it in trust, passes an ordinance, and if the ordinance is approved by the Bureau of Indian Affairs, the money is returned to us for disbursement pursuant to the purposes specified in the ordinance.

The community is also obligated to repay to the Bureau of Indian Affairs $210,000.00. Annual installments in the amount of $25,000.00 must be made. This indebtedness arises out of the revolving boat fund loan and repayment is secured by boat mortgages and mortgages on the cannery buildings and income. To some extent this fund is self-supporting, but in the event it doesn't make $25,000.00 in any one year, so much of the profits as are necessary are added to the balance in the fund to raise the sum of $25,000.00.

[fol. 30] We have eight trap sites on Annette Island. According to the order of Secretary Seaton of early March of this year, we are allowed to utilize fifty (50%) per cent

of the available trap sites. It is our intention to install traps on trap sites No. 3, 4, 6, and 8. Without the operation of these traps, our primary source of income, the life blood of our community will stop flowing. It would become, literally, a community ghost town. Without traps, we would become absolutely dependent as a community and as individuals upon the State of Alaska, or the United States of America. Most of our people would go on welfare, and we would become wards of the government in the literal sense of the word.

We usually have about twenty men engaged in pre-season work on traps alone with an average annual payroll of approximately $30,000.00. The payroll for pre-season work done on the cannery proper amounts to approximately another $30,000.00 annually. The labor performed in the cannery by residents of our community, during the actual season itself, is in excess of $100,000.00. Most of this money is made by female members of the community, and it goes toward the acquisition of clothing and food, etc., for the winter months. If these people did not have a chance to make these wages in the cannery, it is safe to state that there is no place else that they could make it.

From my many years of experience with town affairs and from my intimate knowledge of the cannery operation, I can safely state that without the trap-caught production, we would be forced to curtail the cannery operation in its entirety. Without the operation of the cannery, and the wealth it creates for our community, our people would seriously suffer, to such an extent that we would be little more than an isolated native village, living on a dole, and without hope for the future. Our present achievements and desirable standard of living would go by the board and our model community, as it exists today, would be a thing of the past.

I was present in Metlakatla on June 13, 1959, when Governor William Egan spoke to the members of the Metlakatla Indian Community at the Town Hall. The Governor stated that he was under obligation to the voters of Alaska to see that no traps were operated in the coastal waters of Alaska. I gathered from what he said that he felt a deep

sense of obligation to enforce the laws no matter how much Metlakatla suffered thereby. The general tenor of his remarks was such that I rose to my feet and asked him this question: "Would you insist on total elimination of the traps even if it meant economic ruin of the Metlakatlan people for generations to come?" His answer was, in effect, that the laws of the State of Alaska would be enforced, inasmuch as he had the sworn duty to enforce them.

[fol. 31] At another point in the discussion, he was asked how he proposed to enforce these laws. He stated, in words to this effect, that he "assumed that the State policy would be to send in State officers on the traps to make arrests and confiscate the fishing gear." To do this, of course, the State Police or whoever came upon our reservation, would have to commit trespass upon our properties. In addition to these specific threats that were made to my people on June 13, 1959, I am informed and believe that arrests have been made of other natives, from other native villages to the northward, who were engaged in pre-season trap preparation. It is also my understanding that at least one trap has been confiscated, and I am firmly convinced that if the State of Alaska, its Governor, and the law enforcement officers, are not forbidden to do these things in connection with our traps, that a like course of action will be exhibited in the near future.

Dated at Ketchikan, Alaska, this 19th day of June, 1959.

Raymond V. Haldane

Subscribed and sworn to before me this 19th day of June, 1959.

Ruth E. Brown, Notary Public for Alaska, My commission expires: 9/18/60.

[fol. 32]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8066-A

[Title omitted]

AFFIDAVIT OF HENRY J. DUNCAN

State of Alaska)
First Judicial Division) ss:

Henry J. Duncan, being first duly sworn, on oath, deposes and says as follows:

Like Raymond Haldane, I am a member of the Metlakatla Indian Community. I have resided there for twenty-one years and have served sixteen years on the Council. At present, I am the Treasurer of the Metlakatla Indian Community and a boat owner.

In my official capacity I am fully aware of the financial structure of the Metlakatla Indian Community. In addition to the $75,000.00 retained from the first profits by the community and the REA and Bureau of Indian Affairs revolving boat fund loans requiring repayments, twenty (20%) [fol. 33] per cent of the total net profit is first earmarked for application on indebtedness incurred by the cannery in its disaster operations in 1952 and 1953. There is considerable doubt as to what priority prevails among our creditors, but, suffice it to say, twenty (20%) per cent of the available net profit goes toward retiring heretofore incurred cannery indebtedness, $75,000.00 of the remaining eighty (80%) per cent of net profit to the community, $72,000.00 then to the REA and contingent amounts to the revolving boat fund. Moreover the Council is authorized to withhold, and often does, such sum or sums of money as it deems necessary for cannery replacements or repairs before depositing the remaining net profits, if any, with the Bureau of Indian Affairs.

I, too, was present at Metlakatla when Governor Egan threatened to send State Police into our waters and to

arrest our citizens and confiscate our traps, if we attempted to use traps. In view of what he said then, and in view of what has transpired recently near Kake and Angoon, I believe that the State of Alaska intends, beyond the shadow of a doubt, to move in on our operation in such a manner and at such a time as to prevent our utilizing our traps during the 1959 season, which course of action would cause us great, immediate and irreparable injury.

In such an event, I can state that Metlakatla is doomed. The statistics clearly show that we cannot run our cannery at a profit without trap-caught fish, and it follows that if our cannery falls by the wayside, so, consequently, will our community and its peoples.

Dated at Ketchikan, Alaska, this 19th day of June, 1959.

Henry J. Duncan

Subscribed and sworn to before me this 19th day of June, 1959.

Ruth E. Brown, Notary Public for Alaska, My commission expires: 9/18/60.

[fol. 34]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8066-A

[Title omitted]

AFFIDAVIT OF HENRY S. LITTLEFIELD

State of Alaska)
First Judicial Division) ss:

Henry S. Littlefield, being first duly sworn, on oath, deposes and says:

I am Mayor of the Metlakatla Indian Community, Metlakatla, Alaska; that the Community constitutes an Indian Reservation with a population of Indians of approximately 1000 inhabitants; that our ancestors settled on Annette

Island in the year 1887, having come from Canada at the invitation by and the permission of the United States; that they migrated to Alaska to escape persecution in their former settlement in Canada; that by Act of Congress in March, 1891, Annette Island was set aside as an Indian Reservation for the Metlakatla Indians; that by virtue of [fol. 35] a Presidential Proclamation issued in April, 1916, the waters surrounding Annette Island, to the extent of 3000 feet, were set aside as a fishery right for the exclusive use and benefit of the inhabitants of the reservation; that no restriction was ever made as to the manner in which said fishery right was to be exercised; that the United States as Guardian and Trustee of the Metlakatlans, its wards, has continually protected the Reservation, including the waters belonging thereto, from encroachment by others who attempted to intrude on said waters and to carry therein fishing operations.

That as a result of the creation of said Reservation, the inhabitants thereof have attained a high state of civilization; and, until the decrease in the salmon runs, have been able to realize from a salmon cannery owned and operated by the community, funds with which to educate their children and maintain a good state of health, and economic well being among our people.

That the affairs of the community are administered by a mayor and common council elected by the people, under a constitution and set of by-laws voted upon and approved by the inhabitants and approved by the Secretary of the Interior of the United States.

That Annette Island and the surrounding waters have been adjudicated by the Courts, including the Supreme Court of the United States, as an Indian Reservation; that the Guardian and Trustee for them is the United States, and the inhabitants have been judicially decided to be wards of the United States and entitled to the full protection of the Federal Government.

That the Annette Island and surrounding waters are Federal property; that the United States is the sole owner thereof and has never surrendered its ownership or control over or permitted anyone to interfere with the said Reservation.

That the salmon cannery, boats, fishing gear and fishing rights have been judicially determined to be instrumentalities of the United States.

That the economic welfare and prosperity of the community is entirely dependent upon the successful operation of its salmon cannery; that without the use of its fish traps the cannery can not be operated profitably; that the community has incurred an indebtedness to the United States in approximately the sum of two million dollars; that such indebtedness consists of loans for the construction and operation of a hydro-electric system and boat loans for the members of the reservation; that in order to secure said loans it was necessary to assure the federal government that the loans could be repaid from the operation of its [fol. 36] salmon cannery; that the profits from the said cannery have been pledged to the United States as security for the payment of said loans; that without the operation of said fish traps the loans cannot be repaid which will result in economic disaster to the inhabitants and a loss to the federal government.

That the purpose in seeking ban on the use of fish traps in Alaska was to conserve the runs of salmon; that the use and operation of the four fish traps of the community will in but a very minor manner, if any, affect the conservation of salmon in Alaska waters; that the State of Alaska will not suffer any material damage if the traps are permitted to be operated, while on the other hand, if the Indians of the reservation are denied the right they will suffer irreparable damage and loss.

Henry S. Littlefield

Subscribed and sworn to before me this 19th day of June, 1959.

A. H. Ziegler, Notary Public for Alaska, My commission expires: Sept. 9, 1959.

[fol. 38]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8066-A

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION

Comes now the plaintiff, by counsel, Ziegler, Ziegler & Cloudy, and moves the Court for a preliminary injunction in the above entitled cause enjoining defendants, William A. Egan, and The State of Alaska, their officials, agents, servants and employees from interfering in any manner with the right of the plaintiff to erect, moor, maintain, operate, and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the following sites:

[fol. 39] 1. Annette No. 3, located at 55°02'47" North lat., 131°38'53" West long.

2. Annette No. 4, located at 55°05'41" North lat., 131°36'39" West long.

3. Annette No. 6, located at 55°00'45" North lat., 131°38'30" West long., and

4. Annette No. 8, located at 55°10'13" North lat., 131°19'31" West long.

and that they be enjoined from in any manner attempting to enforce the provisions of 17 SLA 1959, or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described, and that defendants be enjoined from invading, or trespassing on, plaintiff's reservation to accomplish these purposes.

The grounds in support of this motion are as follows: Immediate and irreparable injury, loss or damage will result to the plaintiff, as appears by the verified complaint on file herein, in that defendants will trespass upon plaintiff's

reservation to arrest its members and to confiscate its trap gear, and in that the threatened wrongful conduct of the defendants will deprive plaintiff of its ownership of four fully equipped floating fish traps and all of the salmon those traps would catch during the 1959 salmon fishing season, and subject plaintiff's employees to arrest and prosecution and in so doing cause the shutdown, partial or complete, of plaintiff's 1959 cannery operations thereby depriving the members of the plaintiff from employment, the fishermen [fol. 40] of the plaintiff of a market, and the members of the plaintiff from the benefits through profits that would otherwise accrue to them from the operation of said cannery and traps, and that said injury and harm is irreparable because no action at law will lie against the State of Alaska for the damages accruing thereby and the loss will be forever nonrecoverable to the plaintiff, and even assuming money damages were recoverable the loss to the social and economic welfare of the plaintiff and its members through the loss of property as described and in the loss of profits the amount of which depends upon the size of the salmon run, are not measurable in money now or hereafter.

Unless restrained, Defendants William A. Egan and The State of Alaska, and their agents will make seizures and arrests of the plaintiff and the plaintiff's agents, employees and members and seize the fish traps of the plaintiff and prevent them from being fished in accordance with the laws of the United States, and that to accomplish these things, defendants will necessarily have to trespass upon plaintiff's reservation.

Immediate and irreparable injury, loss or damage will result to the plaintiff by reason of the threatened action of the defendants, as more particularly appears in the verified complaint filed herein. The plaintiff has no adequate remedy at law.

If this preliminary injunction be granted, the injury, if any, to the defendants herein, if final judgment be in their favor, will be inconsiderable and will be adequately indemnified by bond.

Ziegler, Ziegler & Cloudy, Counsel for the Plaintiff, Box 1079, Ketchikan, Alaska, By [Signature illegible], Of Counsel.

[fol. 41]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action No. 8066-A

[Title omitted]

MOTION TO DISMISS

Comes now the defendant, Governor of Alaska, through his attorney, the Attorney General, and moves this Court to dismiss the cause herein on the ground that the complaint fails to state a claim upon which relief may be granted.

1. The situs of all places here involved is within Inland waters of Alaska or on tidelands of Alaska over which the State has, in this instance, exclusive jurisdiction.

2. Plaintiff has no property right in a fish trap location.

3. The State of Alaska has authority to prohibit fish traps for use in commercial fishing.

[fol. 42] 4. The Constitution of Alaska, prohibiting fish traps without exception, has amended the White Act, 48 U.S.C.A. 221 et seq.

5. Regulation 115.26, Revised Regulations of 1959, promulgated by the Secretary of the Interior, Fred A. Seaton, is invalid.

a. Creates a discrimination not permitted under the White Act.

b. Conflicts with the Constitution of Alaska.

And for such other reasons as may appear from the memorandum to be filed herein and made a part of this motion.

Dated at Juneau, Alaska, this 25th day of June, 1959.

John L. Rader, Attorney General of Alaska, By James M. Fitzgerald, Special Assistant Attorney General.

[fol. 43]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DISTRICT NO. ONE AT JUNEAU

AFFIDAVIT OF WALTER KIRKNESS

State of Alaska)
Division Number One) ss:

I, Walter Kirkness, being first duly sworn, on oath depose and say that I make the following affidavit of my own knowledge and the facts are true:

1. That I am the Senior Biologist in the Commercial Fisheries Division, Alaska Department of Fish and Game, and have been employed by that department for nine years in the Territory and now the State of Alaska.

2. That I am familiar with the trap sites of the Angoon and Kake communities as described in their complaints filed herein; that the fish which would normally supply the catch for said traps are migratory and destined for many parts of Southeastern Alaska to rivers and streams, some many miles away from the trap sites; that therefore any fish which would escape the traps or which are conversely caught in the traps are respectively available or not to other fishermen of Alaska who are prohibited the use of fish traps, and, in the event they are not caught, represent the escapement for spawning to provide for future runs.

3. That the plaintiffs' allegations of irreparable damage and loss of a given per cent of fish for their cannery purposes is in some respects speculative, due to the following facts:

a. In past years, approximately 25 to 61 per cent of the fish caught in Southeastern Alaska were caught in fish traps, the type which are now generally prohibited except for those of the plaintiffs herein and four additional traps located near Metlakatla; that in the past there were a total of from 113 to 262 traps fishing in the area generally known as Southeastern Alaska; that due to the fact that all but a very small number of these traps admittedly will not be fishing, it is only reasonable to anticipate, and in my professional judgment I do reasonably expect, that the

catch per seine boat will increase substantially over that of previous years.

b. In addition to the foregoing, which indicates an increased efficiency and productiveness of seine boats, the [fol. 44] Federal Fish and Wildlife regulations at this time permit fishing at all times except from 6:00 P.M. Friday to the following 6:00 A.M. Monday during the season; that in the event that there is more escapement than reasonably determined necessary for spawning, it is quite probable that the regulations will be extended to permit approximately 24 hours more fishing per week per boat. Mathematically, this will increase in excess of 20 per cent the fishing time of each boat.

4. That neither this affiant nor the plaintiffs can say with certainty what the increased productivity of the seine boats may or may not be, due to the factors above-said and due to the further fact of the cyclical nature of the runs which cannot be determined in advance with precise accuracy, but rather must be estimated, based upon available statistical and other information from previous years. In view of the foregoing, the amount of damage to plaintiffs from not using their traps is speculative.

5. In addition to the foregoing, the plaintiffs can, if they desire, bid against other canneries in Southeastern Alaska for independent seine boat catches and thereby acquire additional fish, depending upon the amount bid as compared with other canneries; that because of the competition of the market, affiant states that the increased cost of such bidding by plaintiffs will be regulated by normal principles of competition in the market place.

Further, affiant sayeth not.

Dated at Juneau, Alaska, this 23rd day of June, 1959.

Walter Kirkness

Subscribed and sworn to before me this 23rd day of June, 1959.

Helen T. Monsen, My commission expires May 2, 1962.

Copy received 6-23-59, R. L. Jernberg.

[fol. 45]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DISTRICT NO. ONE AT JUNEAU

No. 8063

ORGANIZED VILLAGE OF KAKE, Plaintiff,

—v.—

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA, Defendant.

No. 8064

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

—vs.—

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA, Defendant.

AFFIDAVIT OF HAAKON B. FRIELE

Haakon B. Friele, being first duly sworn, on oath, deposes and says:

That he has been actively engaged in the Alaska salmon canning industry since 1916, and has been the managing officer of the Nakat Packing Corporation and its predecessor, which has been one of the principal companies in the catching and packing of Alaska salmon since 1922.

That affiant has conducted fishing operations during all of this time in Southeastern Alaska, utilizing both seine caught fish and trap caught fish, and is fully familiar with all aspects of the fishing industry as it exists in that area. Affiant has been requested to explain for the purposes of this proceeding the reason for the closure of some canneries and the plans for reduced production in others,

[fol. 46] which affiant states herein without in any manner taking sides with either party in the above entitled lawsuit.

The Nakat Packing Corporation is the owner of two canneries located in Southeastern Alaska, near Ketchikan, which operated in 1958. One of these canneries is called Waterfall, and the other is called Sunny Point. The two canneries produced a total of 146,689 cases of salmon worth $3,280,071.00. Of this pack, 44,700 cases worth $1,012,055.00 were obtained from purse seine vessels and 101,989 cases valued at $2,268,016.00 were supplied by traps. The traps therefore supplied approximately two-thirds of the total production of these two canneries.

With the loss of the fish obtained from traps, the Nakat Packing Corporation was forced to close the Sunny Point Cannery and operate the Waterfall cannery on a reduced basis, although this company will make every effort to utilize all of the seine boats it has utilized in the past, and any additional seine boats from which it can purchase fish.

In estimating the amount of production which could be expected from seine boats in Southeastern, the following factors were considered:

1. *Size of Run.*

The production in Southeastern for the last five years, as reported by the Final Report of the United States Fish and Wildlife Service for 1958, has been as follows:

1954	1,312,112 cases
1955	839,752 cases
1956	1,049,174 cases
1957	910,394 cases
1958	1,194,047 cases

[fol. 47] Approximately two-thirds of this run consists of pink salmon, and estimates of the total run for each year are based largely on the pink salmon expectation. The progress report on Alaska fisheries management and research for 1958, prepared by the United States Fish and Wildlife Service on page 8 states:

"Considering the data afforded by the three indices used in predicting the magnitude of the pink salmon

run; i.e., escapement, fry enumeration, and fingerling enumeration, it is anticipated that the size of the 1959 pink salmon run in Southeastern Alaska will be between those of 1957 and 1958."

This prediction would make the 1959 run somewhat better than 1955, 1956 and 1957, but not quite as good as 1954 and 1958.

2. *Increase of seine catch in absence of traps.*

In the past, seine boats have accounted for not more than 40% of the total production in Southeastern Alaska, notwithstanding that every effort has been made to increase the catch of seine boats and to utilize all boats available. If the total catch of all seine boats was increased 25% per boat, this increase would still make up only 10% of the 60% lost trap production. It is unlikely that the seine boat production would increase more than this amount. Of course, some fish which would have been caught by traps will this year be caught by seine boats, but most of this fish will escape because the available seine boats cannot fish effectively enough or cover enough area to catch the remaining fish.

[fol. 48] 3. *Extension of fishing time per week.*

In 1958, the seine fishing effort was permitted for five days per week from Monday through Friday. Under Federal law (White Act, 48 USC Sec. 234), Sunday is closed permanently to all commercial gear. It may be that the Fish and Wildlife Service could extend the weekly fishing period by one day through Saturday. However, fishing experience establishes that the catches are best on Monday and decline steadily to the end of the week, disregarding increase or decrease in the runs. On the average, Friday would supply only about 10% of the week's total catch, and presumably the decline would continue on Saturday. Fishing on Saturday therefore would make no significant contribution to increasing the total production. The reason for this decline in fishing efficiency during the week is that

the fish tend to school when fishing is suspended over the week end, and disband upon the commencement of fishing on Monday.

4. *Opening additional areas.*

The opening of additional areas would not be a great contributing factor in increasing seine production unless the number of seine boats was increased to utilize the new areas opened. There is no prospect of a substantial increase in the number of these boats in 1959, and the distribution of boats available is entirely unpredictable.

5. *Construction of new seine boats.*

It is possible to increase the number of seine boats to replace lost trap production, but this can only be done over a period of several years and assuming the [fol. 49] capital investment is available. It would require an average of at least two modern purse seine vessels, costing well over $100,000 for the two, to replace one average trap. There is the further problem of adequately training crews with sufficient skill to economically and safely operate the vessels. There is a shortage of qualified seine boat fishermen and masters, and it will take a concerted effort and several years of training to alleviate this shortage.

6. *Purchasing fish from independent boats.*

The economics of operating a purse seine vessel have been such that practically all owners of such vessels have financing agreements with particular canneries, whereby they agree to sell all of their fish supply to their cannery in exchange for being financed throughout the winter and from year to year in their fishing effort. As a result, less than 5% of the seine fleet are truly independent and free to sell their fish to whomever they like. Although it is true that the price of fish may fluctuate, and a person offering a higher price might for the period of a day obtain a greater supply, the increased price would be quickly met by the other packers and the status quo maintained, unless the price were so high as to be ruinous to the cannery offering it.

Consideration of the foregoing factors resulted in the conclusion of salmon cannery operators that the production in Southeastern would be reduced to about one-half, as a result of which the following canneries, representing approximately 25% of the total production in Southeastern [fol. 50] for 1958, will be closed:

George Inlet
Fidalgo Island
Sunny Point
Wrangell
Douglas

In addition, the remaining canneries of New England at Ketchikan, Ward's Cove, Waterfall, Pacific American Fisheries at Petersburg, Kahler-Dahl at Petersburg, New England Fish Company at Chatham, Hawk Inlet, Pelican and Excursion Inlet, will all be geared to operate well under last year's operation.

Haakon B. Friele

Subscribed and sworn to before me this 25 day of June, 1959.

[Signature illegible], Notary Public in and for the State of Washington, residing at Seattle.

[fol. 51]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DISTRICT NO. ONE AT JUNEAU

No. 8063

ORGANIZED VILLAGE OF KAKE, Plaintiff,

—v.—

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA, Defendant.

No. 8064

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

—vs.—

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA, Defendant.

AFFIDAVIT OF CLARENCE D. PAYNE

State of Washington)
County of King) ss:

Clarence D. Payne, being first duly sworn, on oath, deposes and says:

That I first came to Alaska and engaged in the fishing business in 1913 at the age of twenty-six and was employed in trolling and seine boat fishing. In 1920, I obtained my first trap site, and in 1935 I became part owner of a salmon cannery, and continued as a cannery operator, with some interruption during World War II, until 1958. That during the entire period from 1913 to 1958, I have been actively engaged in all aspects of the Alaska salmon catching and

canning industry, and I am entirely familiar with its present situation and past history, particularly in Southeastern Alaska where my canneries were located and the greatest part of my activities conducted.

[fol. 52] The value of my cannery at Ketchikan was established in 1958 for tax purposes in a judicial proceeding by the above entitled Court at $533,000. With the loss of my trap sites, I can no longer continue in business and have sold the cannery for $75,000 this year. Although since 1954, due to the reduction in fishing effort, I have operated in a joint venture with Ward's Cove Packing Company, and have not operated my own cannery, I was nevertheless optimistic that with the increasing fish supply, it would again be operated. However, with the loss of traps, I not only lost all opportunity of ever again operating my own cannery, but was also thrown completely out of the salmon business, even on a joint venture basis with Ward's Cove Packing Company. The reason is that all of my fish had been supplied from my fish traps, and with the sudden abolishment of fish traps without warning in 1959, inventory of trap equipment, boats and other gear of over $200,000 was destroyed, subject to very questionable salvage value. This left me without the finances to even attempt to build up a purse seine fleet to substitute for the lost trap production.

Furthermore, there are no purse seine boats generally available, as ninety-five percent of all existing boats are tied up with financial arrangements with canneries under which, in exchange for financing and other assistance, the boats supply all of their fish to their financing cannery.

In the past, trap caught fish have uniformly accounted for over sixty percent of the salmon pack, and this was approximately true in 1958. The remaining forty percent of the pack was supplied by purse seine vessels. If these vessels increase their catch by as much as twenty-five percent, which would be more than the best estimates of [fol. 53] those familiar with the business, it would still only increase the total seine catch to fifty percent of the 1958 total production. As only five percent of this total seine catch is completely independent, there is simply not enough

independent fish for anyone who does not have his own purse seine fleet to acquire and run a cannery or participate with other canners.

If a person could afford to substantially raise the price offered the seine boats, he might get some extra fish for a day, but the other packers would meet the price and the original purchaser would be back where he started, without a supply of fish.

It is roughly estimated that it will require approximately $150,000 in investment in seine boats to replace the production of one trap. As my company owned and operated five traps, it would require $750,000 to replace the capacity of these traps with seine boats. It would also require a period of several years to build and equip the boats, and obtain or train crews sufficiently skilled to fish the boats and make it pay. As I did not have that kind of money available, and as I could not finance myself in any event over the intervening years while developing this production, I had no choice but to sell my entire plant and equipment for mere salvage value. Libby, McNeill & Libby also sold all of its Alaska investment in cannery plants and equipment because it was not economic for it to make the transition to a seine fish operation under the circumstances.

As of this time, the following canneries which operated last year in Southeastern Alaska will not operate in 1959:

George Inlet Cannery
Fidalgo Island Cannery
Sunny Point Cannery
Wrangell Cannery
Douglas Cannery

[fol. 54] These canneries represent over 25 percent in productive capacity of the total Southeastern pack. The remaining canneries which are operating are doing so on a limited basis. This sharply reduced operation is based on the unanimous expectation of the various cannery operators that the 1959 Southeastern purse seine fleet will not supply more than fifty percent at best of the 1958 fish production,

although the Southeastern salmon run in 1959 is expected to be almost as good as 1958.

Clarence D. Payne

Subscribed and sworn to before me this 25th day of June, 1959.

Virginia Coleman, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 173]

In the District Court for the District of Alaska

Division Number One, at Juneau

Causes 8063-A and 8064-A

Affidavit of Alf Erickson

I am an independent seine vessel owner and as such I am free to sell my catch to any cannery I choose, one of the prime factors in my selection being the price paid for my fish.

Alf Erickson

Subscribed and sworn to before me at Wrangell Alaska this 24th day of June 1959.

Arthur B. Nelson

[fol. 174]

In the District Court for the District of Alaska

Division Number One, at Juneau

Causes 8063-A and 8064-A

Affidavit of Neil Grant

I am an independent seine vessel owner and as such I am free to sell my catch to any cannery I choose, one of the prime factors in my selection being the price paid for my fish.

Neil Grant

Subscribed and sworn to before me at Wrangell Alaska this 24th day of June 1959.

Arthur B. Nelson

[fol. 175]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Causes 8063-A and 8064-A

AFFIDAVIT OF HAROLD MARTINDALE

I am an independent seine vessel owner and as such I am free to sell my catch to any cannery I choose, one of the prime factors in my selection being the price paid for my fish.

Harold Martindale

Subscribed and sworn to before me at Wrangell Alaska this 24th day of June 1959.

Arthur B. Nelson

[fol. 176]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Causes 8063-A and 8064-A

AFFIDAVIT OF WILLIAM E. SMITH

I am an independent seine vessel owner and as such I am free to sell my catch to any cannery I choose, one of the prime factors in my selection being the price paid for my fish.

William E. Smith

Subscribed and sworn to before me at Wrangell Alaska this 24th day of June 1959.

Arthur B. Nelson

[fol. 177]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Causes 8063-A and 8064-A

AFFIDAVIT OF PETERSBURG FISHING VESSEL OWNERS' COOPERATIVE

Petersburg, Alaska

June 25, 1959

ER K. SATHER	ZAREMBO	WALTER HOFSTAD	B & H
LIVER HOFSTAD	SARAH MARIA	ANDREW GJERDE	HAPPY
ILLIAM LOVE	REX	JACK O'DONNELL	ALASKA MAID
ELS OTNESS	SEANNA	FRED MAGIL	ELIZABETH
ABOLD SISSON	LORELEI	ERIC FUGELVOG	BALDER
OWARD CONN	ROSCO 1	KURT NORDGREN	LOIS W
NDY WIKAN	CURLEW	GORDON JENSEN	SYMPHONY
HIRS ODEGAARD	THOR	LEONARD MARTENS	LOUI M
EIF STROMDAHL	ASTRID	PETER PHILBIN	PROGRESS
OHN R. OTNESS	TEDDY J	LLOYD PEDERSON	MIDDELTON
EO NESS	LIBBY 8	PHILLIP CLAUSEN	HORNET
RLING ESPESETH	BRAVO	A. H. GJERDE	MIDWAY
RIL MATHISEN	LENOR	NORMAN TATE	SURF
. TAGABAN	GJOA	RAY THOMASSEN	SHIRLEY
. ADOLPH MATHISEN	HARMONY	MAGNUS MARTENS	PAMELA RAE
AM IDEM	MISS NORMA	ERNEST ENGE	AUGUSTA
RED HALTINER	VERMA	NELS EVENS	IRA 11
ASPER HALLINGSTAD, SR	BROOKLYN	SAPSER HALLINGSTAD, JR	RAVEN
SCAR SANDVIK	MUNROE	DICK BIRCH	LE CONTE
AUL OLSEN	TORUN	ALVIN FREDRICKSEN	WHIDBY
NDREW HANSON	SOKOL		

The above 41 seine vessels are independent and as such are free to sell their catch to any cannery they choose, one of the prime factors in their selection being the price paid for fish.

Andy Wikan, President.

[fol. 178]

Causes 8063-A and 8064-A

AFFIDAVIT OF PETERSBURG FISHING VESSEL OWNERS' COOPERATIVE

United States of America)
State of Alaska) ss:

I, Vernon A. Counter, Notary Public in and for the State of Alaska, duly sworn and commissioned, do hereby certify that on this 25th day of June, 1959, personally appeared before me Andy Wikan, to me known to be the President of the Petersburg Fishing Vessels Owners Cooperative, a corporation organized under the laws of the State of Alaska, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given Under My Hand and Official Seal this 25th day of June, 1959.

Vernon A. Counter, U.S. Commissioner and Ex-Officio Notary Public, Petersburg Precinct, State of Alaska.

[fol. 179]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

No. 8063-A

THE ORGANIZED VILLAGE OF KAKE, ALASKA, Plaintiff,

—vs.—

WILLIAM A. EGAN, as Governor of the State of Alaska, Defendant.

No. 8064-A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

—vs.—

WILLIAM A. EGAN, as Governor of the State of Alaska, Defendant.

No. 8066-A

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE, A Federally Chartered Corporation, Plaintiff,

—vs.—

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, Defendants.

REPORTER'S TRANSCRIPT OF EXTRACT OF PROCEEDINGS—
June 29, 1959

On the 29th day of June, 1959, court having convened at 9:30 o'clock a.m., at Juneau, Alaska, the first two of the above-entitled causes came on for hearing; the Honorable Raymond J. Kelly, United States District Judge, presiding; and the following is an extract of the proceedings:

[fol. 180] The Court: Before you go into that, before you go into your argument, in view of the statement made by the counsel for the Governor, I think it might be well to state what this Court feels is the general proposition that we should face. This is an interim court during the transition of the judicial system from the Territorial to the State status. As far as the State Act is concerned, we enjoy a dual personality. Whatever might be said in reference to the Federal end of it, there certainly seems to be no question at this time but what we are acting as a State Court.

Now, I believe it is well recognized that the exercise by a state of the Union of a lawful power vested in it is not

subject to judicial supervision. Those are matters that we are going to determine as we go along. It has even been held that rights guaranteed by the Constitution are subject to the imposition of states' standards which are not discriminatory and which do not contravene any restrictions that Congress, acting pursuant to its Constitutional powers, has imposed.

In reference to our jurisdiction, litigants asserting Federal rights as a basis of a claim or as a defense to a claim under state law may do so in state courts which must recognize and protect the Federal rights. There is a duty resting upon state as well as Federal Courts to protect and enforce rights lawfully created without reference to the particular government from whose exercise of lawful power the rights arose. Litigants resting on a Federal right need not resort to Federal Courts to protect those rights where such rights are put in jeopardy in state proceedings.

While Congress has granted to District Courts jurisdic-[fol. 181] tion over cases arising under the Constitution, that is 28 U.S. Code Sec. 1331, that that jurisdiction need not be exercised where it would be appositive of state action and lead to needless interference with state agencies, it likewise need not be exercised where the resolution of state law questions which are complex or unsettled may make it necessary to reach a Federal Constitutional question.

It seems to be well-established procedure, aimed at the avoidance of unnecessary interference by the Federal Courts with proper and validly administered state concerns, to afford state courts a reasonable opportunity to construe state statutes. Federal Courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them.

The Supreme Court has increasingly recognized the wisdom of staying actions in the Federal Courts pending determination by a state court of decisive issues of state law, and, in fact, they have even required United States District Courts to stay their proceedings pending the submission of the state law question to state determination.

I just wanted to put that in the record so as to indicate it is my feeling that we are on perfectly solid ground.

[fol. 182]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Consolidated Civil Cases Nos. 8063 and 8064-A

THE ORGANIZED VILLAGE OF KAKE, ALASKA, Appellant,

—vs.—

WILLIAM A. EGAN, as Governor of the State of Alaska, Appellee.

ANGOON COMMUNITY ASSOCIATION, Appellant,

—vs.—

WILLIAM A. EGAN, as Governor of the State of Alaska, Appellee.

Civil Cause No. 8066-A

Combined with the above two Civil cases on Appeal.

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, Appellant,

—vs.—

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, Appellee.

EXTRACT OF REPORTER'S TRANSCRIPT OF PROCEEDINGS ON JULY 1, 1959, CONTAINING APPELLANTS' ORAL NOTICE OF APPEAL

Extract as Reflected on Page 12 of the Reporter's Transcript.

"Mr. Jernberg: If the Court please, on behalf of Angoon and Kake we now give notice of appeal and ask

that the record so show, and we will file a formal notice a little later on today. We also would like to ask the Court and counsel if they would stipulate that the original record may be transferred by the Clerk of this Court to the Clerk of the Supreme Court of the United States.

Mr. Robert H. Ziegler: Your Honor, may Mr. Jernberg's remarks be deemed applicable to the Metlakatla case, No. 8066-A.

The Court: Certainly. The opinion applies to both."

[fol. 183]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action No. 8063-A

ORGANIZED VILLAGE OF KAKE, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska, Defendant.

Civil Action No. 8064-A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska, Defendant.

Civil Action No. 8066-A

—and—

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE, a federally chartered corporation, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, Defendants.

R. L. Jernberg, of Gore & Jernberg, Ketchikan, and C. L. Cloudy, of Ziegler, Ziegler & Cloudy, Ketchikan, for plaintiffs Organized Village of Kake and Angoon Community Association.

Robert H. Ziegler, Sr., and A. H. Ziegler, of Ziegler, Ziegler & Cloudy, Ketchikan, for plaintiff Metlakatla Indian Community, Annette Islands Reserve.

John L. Rader, Attorney General of Alaska, James M. Fitzgerald, Special Assistant Attorney General, and Douglas L. Gregg, Assistant Attorney General, for defendants.

OPINION—Filed July 1, 1959

Kelly, Judge.

The first two captioned cases were consolidated for trial, and the third was heard the following day. Because of the similarity of the actions, the three cases are consolidated for the purpose of this opinion.

[fol. 184] The urgency of this matter makes immediate determination imperative. It would, of course, be desirable if my decision could be based on a written opinion as complete as the able briefs of counsel for both parties filed herein, but time does not permit the preparation of a formal opinion, so it must suffice that I announce my decision from the bench and do as well as possible from notes and excerpts from decisions.

I need hardly state that I agree with counsel on both sides in their expressed regard for the importance of this action now before us for decision.

We have here a conflict between the authority of the Secretary of the Interior, an officer of the United States, and the Governor of Alaska. In this it is not a conflict of these officials as individuals or personalities, but of what they represent in this controversy.

We have in effect the state opposed to the United States.

We have the majesty of the nation on one hand and the sovereignty of the state on the other; in between, three Indian communities whose plight in the dwindling fish economy of Alaska is a matter of grave concern.

Where the exercise of claimed state power and authority collides with the exercise of claimed federal power and authority, the difficult and tender problem of resolving, under existing law and judicial decisions, the question thus arising, with due regard to the dignity of the one and the sovereignty of the other, becomes the delicate task of the Court.

Able and convincing arguments have been capably presented by counsel for both sides.

[fol. 185] The facts are substantially agreed upon and are fully set forth in the pleadings, briefs and recorded statements of counsel.

After reading the pleadings and briefs, hearing the arguments, examining the exhibits and affidavits, and studying numerous authorities, I have concluded that the relief sought in these three cases must be denied and the bills of complaint therein dismissed.

I will try and state my reasons for this decision.

This Court can take judicial notice of the following facts and conditions and matters of general knowledge:

(1) There has long been growing opposition to fish traps in Alaska, and plebicites held in the Territory in connection therewith have resulted overwhelmingly in votes for the abolishment of traps.

(2) The three Indian villages here concerned as plaintiffs in these actions had voted overwhelmingly for the abolishment of traps.

(3) The salmon runs in Alaska are being rapidly depleted.

(4) The use of fish traps takes great numbers of fish from Alaskan waters for the benefit of the few who own or control the traps.

(5) Even with trap operations, many canneries have been compelled to close in Alaska in recent years, because of lack of an adequate fish supply.

(6) Traps were reduced over the years in number and curtailed in operation, and finally abolished by the state, the well-known purpose of which was to conserve the salmon supply for the benefit of all of the people of the state as a whole.

[fol. 186] (7) Financial loss occurred to some who owned or controlled the traps each time they were cut in number or limited in operation.

I find the following statements of the law determinative of the issues in this case. The state owns the tidelands and controls all areas wherein traps were threatened to be installed. In other words, the proposed trap sites are located in inland waters over which the State of Alaska has dominion.

Mr. Justice Reed, in *Alabama* v. *Texas et al.*, 347 U.S. 272 at page 275, stated:

> If the marginal lands were thus declared by the *California* and following cases to belong to the United States, they were ceded to the states through the subsequent Submerged Land Act of 1953 by the clause: 'Title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters . . . are hereby . . . recognized, confirmed, established, and vested in and assigned to the respective States . . .' Sec. 3(a). If, on the other hand, the marginal lands were not declared by those cases to belong to the United States, title to them remained in the respective states. Either by original ownership or by the cession of the

Act, the lands are now the property of the respective states . . .

The new State of Alaska is entitled to such powers as have been given to all states by the Submerged Lands Act.

Indian fishing rights do not include the right to fish with forbidden gear or in a manner prohibited to other citizens of the state.

No property right exists in fish traps and their use has been legally prohibited in the state.

The "equal footing" clause has long been held to refer to political rights and to sovereignty and to have a direct effect on certain property rights, and the question arose early in controversies between the states and the federal government as to ownership of the shores of navigable waters, and it was held that to deny to the states, admitted subsequent to the formation of the Union, ownership of this property, would deny them admission on an equal [fol. 187] footing with the original states. *Pollard's Lessee* v. *Hagan*, 44 U.S. 212, 228-229 and cases cited.

Upon the admission of a state to the Union the title of the United States to lands underlying navigable waters within the state passes to it as incident to the transfer to the state of local sovereignty and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. *United States* v. *Oregon*, 295 U.S. 1, 14.

The lands on which the fish traps are to be moored are tidelands or lands underlying inland waters, and subject to the authority of the state to regulate fishing.

Of course the United States has responsibility under laws passed by Congress toward the Indians. The United States has made treaties—solemn pacts with Indian nations. Indians have been accorded rights by the United States in Territories and in lands controlled by the United States, but many of these rights disappear when a new state is formed. *Ward* v. *Race Horse*, 163 U.S. 504. In this case, on page 514, Mr. Justice White stated as follows:

> * * * It may be further, for the sake of the argument, conceded that where there are rights created by Con-

> gress, during the existence of a Territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration. * * *

See also *Kennedy* v. *Becker*, 241 U.S. 556; *U. S.* v. *Winans*, 198 U.S. 371 (384). An Indian reservation created by executive order of the President conveys no right of use or occupancy beyond the pleasure of Congress and the President.

When an Indian reservation is established by treaty the right of use or occupancy depends upon the language or the purpose expressed therein.

Congress has power to make a reservation inclusive of the adjacent waters and submerged lands as well as up- [fol. 188] lands * * *. The reservation thus created is not a private grant but simply a setting apart until otherwise provided by law.

Statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. (See *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, pages 87 and 89.)

The reservation of the Metlakatla Indians was created at the will of Congress and did not constitute final disposal of the lands underlying the navigable waters. The extension of the 3,000 feet to include exclusive fishing rights by the President likewise did not constitute final disposal but only a grant until otherwise provided by law. The federal government retained jurisdiction thereof until Alaska became a state but upon achieving statehood, dominion and sovereignty thereof passed to the new state, subject only to the authority of the federal government in regulating navigation and commerce. *Pollard's Lessee*

v. *Hagan*, 44 U.S. 212. The presidential order which extended the exclusive fishing rights 3,000 feet offshore simply prohibited others from fishing therein and cannot be construed to permit the use of traps therein when prohibited by state law.

Under territorial status the Annette Island natives could not claim any vested property right in any particular method or means for taking fish. Their authority to operate a fishery at all came from the Secretary of the Interior under the provisions of the White Act.

The state regulates and controls wildlife resources and fisheries in the marginal sea. This was originally based on a concept of ownership. (*McCready* v. *Virginia*, 94 U.S. 391). This theory has to some extent been repudiated and the modern concept contemplates that state control is founded upon the power to regulate in the state the protection of these resources for all the people.

The state has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people. *Geer* v. *Connecticut*, 161 U.S. 519. See also

Skiriotes v. *Florida*, 313 U.S. 69
[fol. 189] *Toomer* v. *Witsell*, 334 U.S. 385
Corsa v. *Tawes*, 149 Fed. Supp. 771

The right to control fisheries rests in the state in the absence of affirmative action of Congress. *Manchest* v. *Mass.*, 139 U.S. 240.

Fish and game are owned by the states, not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people in common. *U. S.* v. *Shauver*, 214 Fed. 154.

The White Act, 48 U.S.C. Sec. 221, was passed by Congress to protect and conserve fisheries in Alaska. It was amended by Sec. 6 (e) of the Alaska Statehood Act, which contained the so-called Westland proviso. The constitution of the State of Alaska became effective simultaneously with the Statehood Act, and with it Ordinance Number Three, which for reasons therein stated, abolished the use of fish traps for the taking of salmon for commercial purposes in all the coastal waters of the state.

If the White Act is amended by Sec. 6 (e) and by Ordinance Number Three as interpreted by the Secretary of the Interior (*Ketchikan Packing Co.* v. *Seaton*, opinion filed May 14, 1959, United States Court of Appeals for the District of Columbia) then the White Act must prohibit the use of traps in Alaskan waters.

The *Ketchikan Packing* case holds that Congress intended the Secretary to be a trustee for both the federal government and the new state during the transition of administration from the federal to the state authorities in the broad national interest. It further held that the Secretary, in that unique capacity, could not reasonably disregard a valid law of Alaska existing on January 3, 1959, the effective date of the Alaska Statehood Act and the Alaska constitution, and Ordinance Number Three.

The authority conferred upon the Secretary by existing law, as above set forth, should not be permitted to impair the powers or rights of the new state which come from the status of statehood. To do otherwise would seem to impair the equal footing standing of the new state.

[fol. 190] The White Act is still in effect and is the Act from which the Secretary of the Interior derived his authority, and this Act specifically states that every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies and that no exclusive or several right of fishery shall be granted therein. Therefore the White Act forbids exclusive right of fishery. This was the holding in the case of *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, at page 122:

> As Sec. 208.23 (r) with its exception in favor of the natives in possession of Karluk Reservation and their licensees is based upon Sec. 1 of the White Act, we think it clear that its proviso 'that no exclusive or several right of fishery shall be granted therein' applies to commercial fishing by natives equally with fishing companies, nonresidents of Alaska or other American citizens and so applies whether those natives are or are not residents on a reservation. We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights. * * * The

> White Act fishing preserves were not intended to furnish a monopoly to a favored few. * * *

There are many cases besides those which I have mentioned which have been cited by counsel in their briefs and arguments which support the conclusions here reached, that the Secretary of the Interior is without authority to except the fish traps of the plaintiffs from his Order dated March 7, 1959, 24 Fed. Reg. 2053-71, prohibiting the use of fish traps in Alaskan waters effective April 18, 1959; and that the State of Alaska has authority to prohibit all fish traps in Alaskan waters, including those of the plaintiffs, and the plaintiffs are not entitled to the relief here sought.

Findings of Fact, if desired, may be presented, together with Judgment and Decree in accordance with this opinion.

Raymond J. Kelly, U. S. District Judge.

[fol. 191]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action No. 8063-A

ORGANIZED VILLAGE OF KAKE, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska, Defendant.

Civil Action No. 8064-A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska, Defendant.

Civil Action No. 8066-A

—and—

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE, a federally chartered corporation, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, Defendants.

MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL

Come Now the parties above named by their counsel, R. L. Jernberg, C. L. Cloudy, and R. H. Ziegler, and move the Court for an order granting said parties the preliminary injunction pending appeal of said cases to the United States Supreme Court.

[fol. 192] Dated at Juneau, Alaska, this 2nd day of July, 1959.

R. L. Jernberg, C. L. Cloudy, R. H. Ziegler, By R. L. Jernberg, Of Counsel for Plaintiffs.

ORDER

The above-entitled motion having duly come on for hearing before the Court the 2nd day of July, 1959, and the Court being fully advised in the premises, does order that said motion be and the same is hereby denied.

Done in open court the second day of July, 1959.

Raymond J. Kelly, District Judge.

[fol. 193]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

SUPPLEMENTAL FINDINGS OF FACT No. 1

The waters of the Alexander Archipelago, State of Alaska, which lie to the landward of a line drawn from

Cape Spencer lighthouse at the entrance of Cross Sound, and following generally the sinuosities of the coast, that is, the meander line of mean low water, and bridging headlands and bays as the line is drawn in a general southeasterly direction past Cape Bartholomew, Cape Muzon, and eastward through Cape Chacon and ending at a line drawn from the northermost extremity of Pt. Mansfield, Sitklan Island, 040° true, to where it intersects the mainland, as more particularly described in 33 C.F.R. 82,275, are all inland waters and historic bodies of water. Because of historic, social, and geographic considerations, of which this court takes judicial notice, and based also on a consideration of the record in this case, I find:

That geographically and geologically the Alexander Archipelago is part of a long mountain range which extends from the southern tip of the so-called Panhandle of Alaska's general land mass in a northwesterly direction, and includes the St. Elias Mountains, the Wrangell Mountains, and the Talkeetna Mountains in Southcentral Alaska;

That the main mass of igneous rocks which intruded the older sediments forms the core of this general land mass. The resulting topography, formed by erosion of the complex fault patterns and contacts between different rock types, and a later partial inundation, is a series of long, narrow arms of the sea, which have encroached upon the general land mass without actually altering its original coastline facing the open sea;

That the general land mass of the Alexander Archipelago retains its mountain-range character with elevations ranging from 2,000 to 6,000 feet, and that the present arms of the sea were at one time river valleys which have been eroded by glacial action, creating the long, narrow fiords which exist today as inland waterways, the only substantial means of surface transportation throughout the Archipelago.

[fol. 194] That the historical economy of the area involved is primarily oriented to a marine way of life in which the inland waters furnish the primary, and in many areas, the only industry. Said waters are in every respect a necessary and intimate part and parcel of the territory of the State of Alaska.

SUPPLEMENTAL FINDINGS OF FACT No. 2

Although plaintiff may suffer some loss if the right to fish by means of fish traps is denied, still I find that the damages alleged are to a large extent speculative in nature because of (1) the limited predictability of the salmon runs, (2) the existence of an independent fleet of seine boats with whom plaintiffs are free to bid for their catch on the basis of the price offered therefor, and (3) the possibility of increased catches by plaintiffs' own seine boats resulting from the abolition of fish traps.

SUPPLEMENTAL FINDINGS OF FACT No. 3

The Court judicially notices that fish traps, whether of the floating or pile-driven variety, are customarily affixed to the shoreline with the remainder necessarily extending out over tidelands and beyond into the navigable waters below the meander line of mean low tide.

[fol. 195]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

No. 8066-A

In the matter of the

METLAKATLA INDIAN COMMUNITY, Plaintiff,

—vs.—

WILLIAM A. EGAN, Defendant.

ORDER FOR DISMISSAL

This Matter having come on before the Court for final hearing on plaintiff's complaint for a permanent injunction on the 29th day of June, 1959; plaintiff appearing through its counsel, Robert H. Ziegler, and defendant appearing through its counsel, the Attorney General for the State of Alaska, and the Court having heard oral argument and having rendered its opinion, which opinion with supplemental

findings of fact is in lieu of findings of fact and conclusions of law,

It Is Therefore Ordered, Adjudged and Decreed that the complaint of the plaintiff be and it hereby is dismissed with prejudice.

Witness my hand and seal of this honorable Court this 2nd day of July, 1959.

Raymond J. Kelly, District Judge.

[fol. 212]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action No. 8063

ORGANIZED VILLAGE OF KAKE, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska, Defendant.

Civil Action No. 8064

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska, Defendant.

AFFIDAVIT OF LT. E. L. MAYFIELD

United States of America)
) ss:
State of Alaska)

I, Lt. E. L. Mayfield, being first duly sworn on oath depose and say:

That I am Lt. E. L. Mayfield, the Officer in charge of the First Division of the Department of State Police; and that on June 15th, 1959, I was assigned to the duty of supervising Officers in the assignment of patrolling the area of Kake with reference to the enforcement of the Alaska Laws pertaining to fish traps;

That during the course of the following events I was present during the mooring of a fish trap identified by writing on the trap "Organized Village of Kake", Point Pybus, Fish and Wild Life, #216. At 12:55 P.M., June 17th, 1959, at a location of Point Pybus I observed the above-described fish trap being towed into location with the tail-hold secured on shore. This trap was being towed by a tug named the Snowmist, on the port side, and a power scow named Jo-G on the star board side. A rigging scow named the Iron [fol. 213] Mike was against the shore at a point about 100 yards or less from the place where a sign had been posted prohibiting the erection of fish traps. At 1:30 P.M. it appeared that the trap was in position and was being held there by a tight tow line to the Snowmist. The Jo-G was underway with the scow, Iron Mike. From 1:30 P.M. until 4:43 P.M. I observed seven anchors being attached to the trap and pulled out in several directions and dropped. This was being done by the Jo-G and the Iron Mike, with the Snowmist still holding a tight line on his tow. This operation was accomplished by the three above-named boats and 15 individuals, 3 of which were natives and gave their residence as Kake, Alaska. The remainder were white men and gave their residence as the State of Washington.

During the mooring of the fish trap, the boat called Leif, arrived and stood by until the last anchor was dropped and then pulled up along the side of the trap and anchored. Aboard the Leif were 2 white men. One identified his residence as Ketchikan, Alaska, and the other as the State of Washington.

Further affiant sayeth not.

Lieut. E. L. Mayfield

Subscribed and Sworn to before me this 29th day of June, 1959.

Helen T. Monsen, Notary Public in and for Alaska,
My Commission Expires: 5/2/1962.

[fol. 215]

Appendix No. 4

In the District Court for the District of Alaska

Division Number One at Juneau

Affidavit of Phil R. Holdsworth

United States of America)
) ss:
State of Alaska)

Phil R. Holdsworth, being first duly sworn, deposes and says:

That he is Commissioner of Natural Resources for the State of Alaska and holds a Bachelor of Science degree in Mining Engineering and Geology.

That he has been active in the mining industry in Alaska, and has intimate knowledge of land and water conditions in Southeastern Alaska based upon thirty years of residence within the State.

That in connection with mining and land activities, he has covered much of the Alexander Archipelago on foot and by air.

That geographically and geologically the Alexander Archipelago is part of a long mountain range which extends from the southern tip of the so-called Panhandle of Alaska's general land mass in a northwesterly direction, and includes the St. Elias Mountains, the Wrangell Mountains, and the Talkeetna Mountains in South-central Alaska.

That the main mass of igneous rocks which intruded the older sediments forms the core of this general land mass. The resulting topography, formed by erosion of the complex fault patterns and contacts between different rock types, and a later partial inundation, is a series of long, narrow arms of the sea, which have encroached upon the general land mass without actually altering its original coastline facing the open sea.

That the general land mass of the Alexander Archipelago retains its mountain range character with elevations rang-

ing from 2,000 to 6,000 feet, and that the present arms of the sea were at one time river valleys which have been eroded by glacial action creating the long, narrow fiords which exist today as inland waterways, the only means of transportation throughout the Archipelago.

That two official maps published by the U. S. Geological Survey, Department of the Interior, are submitted in sup- [fol. 216] port of the above statements and are attached as Exhibits A and B.

Exhibit A. Map I-84 Miscellaneous Geologic Investigations—Mesozoic and Cenozoic Tectonic Elements of Alaska by Thomas G. Payne, 1955.

Exhibit B. Geologic Map of Alaska compiled by J. Thomas Dutro, Jr. and Thomas G. Payne, 1957.

That Exhibit A clearly shows that the Prince of Wales Geanticline, which is the Alexander Archipelago, is an extension of, and is identical with the Talkeetna Geanticline which includes the St. Elias, Wrangell, and Talkeetna Mountains.

That Exhibit B confirms the above by showing that the age and pattern of the various rock types are similar along this continuous range of mountains extending through the general land mass of Alaska from Dixon Entrance on the southeast to Bristol Bay on the southwest.

Dated this 28th day of June, 1959.

/s/ PHIL R. HOLDSWORTH
Phil R. Holdsworth

Subscribed and sworn to before me this 28th day of June, 1959.

/s/ CATHRYN C. MACK
Notary Public for Alaska

Notary Public for the State of Alaska
My Commission Expires May 12, 1963

(Notary Public Seal)

[fol. 217]

Appendix No. 5

In the District Court for the District of Alaska

Division Number One at Juneau

Affidavit

United States of America,)
) ss:
State of Alaska,)

James A. Williams, being first duly sworn upon his oath, deposes and says:

That he is a state mining engineer employed in the Department of Natural Resources, Division of Mines and Minerals;

That he has been employed as a mining engineer by the Territory, now State of Alaska for nine years;

That he is a graduate of the University of Alaska and holds degrees in mining engineering and geological engineering;

That he has completed a land mass and water mass survey of the entire Southeastern Panhandle from its southern most portion northward to a line drawn from a point on the sea coast, which point is due west of Mt. Fairweather;

That the island mass of Alexander Archipelago computed under this survey totals 14,400 square miles, more or less;

That the mainland land area totals 16,600 square miles, more or less;

That the total water mass of the area measured totals 7,500 to 8,000 square miles, more or less;

That the total area of Southeastern Alaska including land and water measures 38,500 square miles, more or less;

That from the foregoing figures he concludes that approximately 19 per cent of the total area of the Southeastern Alaska Panhandle comprises water.

/s/ James A. Williams
James A. Williams

Subscribed and sworn to before me this 29th day of June, 1959.

/s/ Helen T. Monsen
Notary Public in and for Alaska,
My Commission Expires: May 2, 1962.

(Notary Public Seal)

[fol. 218]

Appendix No. 6

In the District Court for the District of Alaska

Division Number One at Juneau

United States of America,)
) ss:
State of Alaska,)

Edward L. Keithahn, being first duly sworn on oath, deposes and says:

That he is Curator and Librarian in the Alaskan Museum and Library in Juneau, Alaska, and has served as such since 1941;

That he is a graduate of the University of Washington and holds a Bachelor's Degree in General Studies;

That he has published various professional papers dealing with aspects of Alaskan History and Ethnology;

That he is well acquainted with the geography of Southeastern Alaska, more commonly known as the Alaskan Panhandle, having lived in Southeastern Alaska for 31 years;

That through his intimate acquaintance with Alaskan history he states that the waters of the Alexander Archipelago from Dixon Entrance to Cape Spencer are waters over which first Russia, then the United States have exer-

cised sovereignty which has not been successfully challenged for over 100 years;

That the exercise of such sovereignty first by Russia and subsequently by Alaska and the United States over said lands and waters, as well as the historic background of the area have led to the conclusion that the said waters are historic bodies of water and inland waters of Alaska.

/s/ Edward L. Keithahn
Edward L. Keithahn

Subscribed and sworn to before me this 29th day of June, 1959.

/s/ Helen T. Monsen
Notary Public in and for Alaska,
My Commission Expires: May 2, 1962.

(Notary Public Seal)

[fol. 219]

Supreme Court of the United States

Nos. 326 and 327, October Term, 1959.

Metlakatla Indian Community, Annette Island Reserve, Appellant,

vs.

Egan, Governor of Alaska, et al., and
Organized Village of Kake et al., Appellants,

vs.

Egan, Governor of Alaska.

Order Postponing Jurisdiction—December 7, 1959

Appeals from the District Court of the State of Alaska.

The statements of jurisdiction in these cases having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the cases on the merits. The cases are consolidated and a total of three hours is allowed for oral argument.

[fol. 221]

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 326

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, Appellees.

APPELLANT'S DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed December 28, 1959

Appellant designates the following portions of the record herein for printing by the Clerk of this Court:

1. Notice of Appeal: R. 1-5
2. Complaint and affidavits, including schedules: R. 6-37
3. Motion for Preliminary Injunction: R. 38-40
4. Motion to Dismiss: R. 41-42
5. Extract of Transcript: R. 179-181
6. Extract of Transcript: R. 182
7. District Court Opinion: R. 183-190
8. Motion for Injunction Pending Appeal and Order: R. 191-192
9. Supplemental Findings: R. 193-194
10. Order of Dismissal: R. 195
11. This designation and proof of service.

Richard Schifter, Counsel for Appellant.

Dated: December 28, 1959

[fol. 222] Proof of Service (omitted in printing).

OFFICE COPY

SUPPLEMENTAL TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1958~~ 1960 1961

No. ~~326~~ 5 2

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, APPELLANT,

vs.

EGAN, GOVERNOR OF ALASKA, ET AL.

No. ~~327~~ 6 3

ORGANIZED VILLAGE OF KAKE, ET AL., APPELLANTS,

vs.

EGAN, GOVERNOR OF ALASKA.

APPEALS FROM THE DISTRICT COURT OF THE STATE OF ALASKA

FILED AUGUST 20, 1959
JURISDICTION POSTPONED DECEMBER 7, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

No. ~~326~~ 5

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, APPELLANT,

vs.

EGAN, GOVERNOR OF ALASKA, ET AL.

No. ~~327~~ 6

ORGANIZED VILLAGE OF KAKE, ET AL., APPELLANTS,

vs.

EGAN, GOVERNOR OF ALASKA.

APPEALS FROM THE DISTRICT COURT OF THE STATE OF ALASKA

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[fol. A] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Consolidated Civil Cases Nos. 8063-A and 8064-A

THE ORGANIZED VILLAGE OF KAKE ALASKA, Appellant,

vs.

WILLIAM A. EGAN, as Governor of the State of Alaska, Appellee.

ANGOON COMMUNITY ASSOCIATION, Appellant,

vs.

WILLIAM A. EGAN, as Governor of the State of Alaska, Appellee.

NOTICE OF APPEAL

I. Notice Is Hereby Given that the Organized Village of Kake Alaska, and the Angoon Community Association, federal chartered Indian corporations, Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the District Court for the State of Alaska, Division Number One, Juneau, Alaska, [fol. 2] entered July 2, 1959, dismissing the complaints filed by Appellants.

This appeal is taken pursuant to 28 USC 1257 (1) and (2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint filed by Organized Village of Kake Alaska, with affidavits of J. D. Thompson and Ernest Williams attached.

2. Complaint filed by Angoon Community Association with affidavits of Albert Thompson and Samuel Johnson attached.

3. Motion for preliminary injunction filed by Organized Village of Kake Alaska, and by Angoon Community Association.

4. Motion to dismiss complaints filed by Appellee William A. Egan against Organized Village of Kake Alaska, and Angoon Community Association.

5. Affidavit of Walter Kirkness filed by Appellee, William A. Egan.

6. Affidavits of Haakan Friele and Clarence D. Payne, filed by Appellant, Organized Village of Kake Alaska, and Angoon Community Association.

7. Brief of Appellant, Organized Village of Kake Alaska, and Angoon Community Association, filed in support of complaints.

8. Brief of Appellee, William A. Egan, filed in support of Motion to Dismiss Complaints.

9. Affidavits of Alf Erickson, Neil Grant, Harold Martindale, William E. Smith, and Andy Wikan, filed by Appellee, William A. Egan.

10. Reporter's transcript of proceedings of June 29, 1959, relating to assumption of jurisdiction by District Court as a State Court.

[fol. 3] 11. Reporter's transcript of record of proceedings on July 1, 1959, containing Appellants' oral notice of appeal.

12. Opinion rendered by the Court on July 1, 1959.

13. Motion for preliminary injunction pending appeal filed by Organized Village of Kake Alaska, and Angoon Community Association.

14. Order of Court denying motion for injunction pending appeal.

15. Supplemental findings of fact entered by Court on July 2, 1959.

16. Judgment of dismissal of the complaints of Organized Village of Kake Alaska, and Angoon Community Association entered July 2, 1959.

III. The following questions are presented by this appeal:

1. Is all authority to administer and manage the fish and wildlife resources of Alaska for the year 1959 reserved to the Federal Government by the terms of Section 6 (e) of the Alaska Statehood Act, 72 Stat. 339, so as to make the Alaska criminal statutes, 17 SLA 1959 as amended by 95 SLA 1959, unenforceable against the appellants by the State and its officials, and so as to make the regulations issued by the Secretary of the Interior (24 FR 2053 et seq.) March 7, 1959, allowing Appellants to fish the trap sites therein designated a valid exercise of that authority?

2. If Section 6 (e) of the Alaska Statehood Act, 72 Stat. 339, does purport to reserve such control to the Federal Government and thereby render inapplicable the Alaska criminal statutes, does Section 6 (e) violate the "equal footing" doctrine governing the admission of new States to the Union?

3. Does the Alaska Statehood Act, 72 Stat. 339, in Section 4 thereof and in its adoption and ratification of the Alaska Constitution (in this instance specifically Article 12, Section 12 thereof) comprehend a permanent disclaimer by the State of Alaska of control over Indian fishing within the State, and if so, is Section 4 of the Statehood Act an assumption of permanent jurisdiction (subject to further act of Congress) by the Federal Government over the location and manner of Indian fishing within the State,

[fol. 4] and further are the regulations issued by the Secretary of the Interior (24 FR 2053 et seq.) March 7, 1959, allowing Appellants to fish the trap sites therein designated a valid exercise of that authority?

4. If the Alaska Statehood Act does so comprehend a permanent disclaimer by the State of Alaska and a permanent assumption of jurisdiction by the Federal Government, does it violate the "equal footing" doctrine governing the admission of new States to the Union?

R. L. Jernberg, Attorney for The Organized Village of Kake Alaska and Angoon Community Association, Appellants, P. O. Box 893, Ketchikan, Alaska.

[fol. 5] Proof of Service (omitted in printing).

[fol. 6]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action File No. 8063A

THE ORGANIZED VILLAGE OF KAKE ALASKA, Plaintiff,

vs.

WILLIAM A. EGAN, as Governor of the State of Alaska, Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF—June 22, 1959

Comes now the plaintiff and for cause of suit alleges:

I.

That the plaintiff is a Federal Corporation, chartered as an organized Indian village under the laws of the United

States of America, which charter was ratified according to law under date of January 27, 1948, and is authorized by said charter to sue and be sued in courts of competent jurisdiction. That said village is located at Kake, Alaska; that said corporation is a membership corporation whose membership is that of the entire village, presently numbering 400 people; that the members thereof are of the Thlinget Indian Tribe; that the United States Department of Interior has authorized the institution of this suit by the plaintiff and the retention of counsel by the plaintiff for that purpose.

II.

That in July, 1950, plaintiff commenced doing business as Keku Canning Company, after the United States of America acquired title in its own name as trustee for the [fol. 7] plaintiff to certain salmon cannery property located on U. S. S. 693, at Kake, Alaska, including, but not limited to, cannery buildings, canning equipment, warehouses, docks, floats, outbuildings, boats, nine fish trap sites and the assignment of War Department Permits therefor, nine "tailhold" and "watchman cabin" sites and assignment of United States Forest Service Use Permits therefor, trap brailing tenders, trap setting tenders and rigging scows and all other equipment normally associated with the acquisition and processing of fish caught by a floating fish trap. That said purchase and acquisition was by the United States of America acting through the Department of Interior and Acts of Congress, and pursuant thereto the funds necessary to accomplish said acquisition were supplied by the United States of America in the amount of $362,000.00, and said property has a present day book value of $377,-000.00.

III.

That since July, 1950, plaintiff has, as beneficial owner to the date of this complaint, continuously operated its cannery and fished its trap sites (during seasons prescribed by law) in pursuit of the purposes for which it was organized as a Federal chartered Indian corporation, with the exception that during the past few years of declining

salmon runs, the plaintiff has, as a party to a general agreement among the salmon industry in Alaska, restricted its use of its sites so as to use less than all of the nine sites from year to year.

IV.

That since July 1950, the funds for operation of said cannery, setting and fishing of the traps, etc., have been supplied by the United States of America; that during this period the plaintiff has paid no tax to the Territory of Alaska based upon operation of fish traps or the packing of salmon for commercial purposes by reason of the fact that it claimed exemption as a Federal chartered Indian corporation, an instrumentality of the federal government [fol. 8] and therefore exempt from taxation by the Territory.

V.

That the operation of the cannery and utilization of the fish trap sites mentioned was undertaken by the plaintiff for the purpose of furnishing employment for the members of the Organized Village of Kake, and to provide a means of allowing them to have their social and welfare needs advanced through use of profits obtained from the operation, all designed to promote the advancement of the people of the said village in a manner compatible with the intention of the Congress of the United States to care and provide for the social and economic welfare of the Indian.

VI.

That on or about November 14, 1958, the Secretary of the Interior published in the Federal Register (23 F.R. 8874) a notice that he intended to amend the then existing regulations governing fishing for or taking species of commercial fish and shellfish in the waters of Alaska, and that it was proposed to prohibit the taking of fish in Alaska waters by use of fish traps except insofar as certain Indian tribes or villages were concerned; that on March 7, 1959, the said Secretary of Interior published his amendments to the fishing regulations in 24 F.R. 2053, and therein prohibited the

taking of fish in Alaska waters by use of fish traps except that such taking would be allowed with respect to trap sites owned, among others, by the Organized Village of Kake, Alaska, plaintiff herein, therein described as follows:

(1) Kake-Cape Fanshaw, located at 57° 10′ 52″ N. lat. 133° 32′ 44″ W. long.

(2) Kake-Point Pybus, located at 57° 18′ 40″ N. lat. 133° 57′ 21″ W. long.

(3) Kake-Point Macartney, located at 57° 01′ 23″ N. lat. 134° 02′ 50″ W. long.

(4) Kake-Cornwallis, located at 56° 55′ 52″ W. lat. 134° 16′ 08″ W. long.

[fol. 9] VII.

That on or about March 10, 1959, Elmer Bennett, the then acting Secretary of the Interior advised James E. Hawkins, Area Director, Alaska Native Service, Juneau, Alaska, that pursuant to the disclaimer of Indian fishing rights made by the State of Alaska, upon admission to the Union, and pursuant to the long-standing supervisory control exercised by the United States for the protection of the Indians, the regulations for fishing in Alaska for 1959 would permit the operation of traps by the plaintiff (among others) and that therefore the plaintiff (among others) could proceed to make plans for the operation of their salmon canneries in 1959 on the basis that they would be allowed to continue the use of such traps as designated by the Secretary; that this information was transmitted by James E. Hawkins to the plaintiff herein under date of March 16; that pursuant to the information therein contained the plaintiff then undertook to ready itself to operate its cannery for the 1959 season based upon the operation of four trap sites; that pursuant thereto, plaintiff notified the Acting Regional Director of the Bureau of Commercial Fisheries, Juneau, Alaska, under date of April 1, 1959, that plaintiff was going to operate the four above described trap sites, following which on or about May 12, 1959, plaintiff was supplied by the Petersburg office of the said

Bureau of Commercial Fisheries instructions and regulations concerning the operation of said traps and seals for their closure during closed periods.

VIII.

That on or about May 21, 1959, the defendant, William A. Egan as Governor for the State of Alaska made public his intent to seek enforcement of a Statute of the State of Alaska, identified as 17 SLA 1959 stating that said statute [fol. 10] prohibited the use of fish traps in Alaska, and that it made it a crime subject to fine and imprisonment to violate the provisions thereof and stating further that the third ordinance the Constitution of Alaska prohibited the plaintiff's use of fish traps, and that the police power of the State of Alaska prohibited said use; thereafter the said defendant on numerous occasions, in newspapers and in personal appearances before the public, including appearances before the Council of the plaintiff stated that if the plaintiff installed its traps that the State of Alaska would seize them, arrest the persons who installed and maintained them, and take such other actions as he deemed appropriate to the alleged violation of law; these threats were also made by agents of the defendant William A. Egan acting on his behalf directly to the plaintiff's council on a number of occasions and to the attorneys retained to represent the plaintiff's interests; that on or about the 15th day of June, 1959, plaintiff set one of its trap frames at its site at Pybus Point, and thereafter the defendant William A. Egan carried out his threat and caused the law enforcement officers of the State of Alaska to arrest the President of the Council of the plaintiff and the foreman of the crew that set the trap, and caused informations to be filed against them in this Court, and further that said trap has been seized and possessed by these law enforcement officials acting under direct authority of said defendant William A. Egan.

IX.

That the action heretofore taken by the said defendant and his agents, and the action threatened to be taken is

wrongful and in violation of the laws of the United States of America, and in violation of the Constitution of the United States of America, and in violation of the Constitution of the State of Alaska, for the following reasons, and such other reasons as will be brought forth at trial [fol. 11] of this cause, to-wit:

1. That the laws of the United States of America prevent the State of Alaska, or any officer or agent thereof from exercising any control over the supervision and management of the fish and wildlife in Alaska at this time (Section 6e Statehood Act, 72 Stat. 339, Section 6e).

2. That the laws of the United States of America (Section 4 Statehood Act, 72 Stat. 339, Sec. 4) and the Constitution of the State of Alaska (Article 12, Section 12) prevent the State of Alaska from interfering with the control and management of Indian fishing rights held either by Indians or held by the United States of America in trust for Indians, at any time, now or in the future.

3. The regulations issued by the Secretary of the Interior (24 F.R. 2053, et seq.) March 7, 1959, allowing the plaintiff to operate and utilize four fish traps at the sites noted hereinabove constitute an exercise by the United States of its exclusive power both over the whole Alaska fisheries and over the fishing rights of Indians.

4. The commerce clause of the Constitution of the United States of America places the regulation of the social and economic welfare of Indians as well as the regulation of fish and wildlife resources of the United States exclusively within the power of Congress of the United States.

5. That the statute under which defendant claims his authority (17 SLA 1959), the claimed constitutional mandate (Ordinance #3), and the general claim of [fol. 12] police power are all repugnant to the principles and laws above stated and therefore are in violation of the laws of the United States, the Constitution

of Alaska and Constitution of the United States of America and are therefore void and of no force and effect.

X.

That unless the Court prevents the defendant from so doing by its power of injunction, the defendant will cause his agents and law enforcement officials to seize the plaintiff's traps, arrest the people employed by plaintiff to erect and maintain said traps, every time the plaintiff seeks to place and fish such trap or traps pursuant to the regulations issued by the Secretary of Interior as above mentioned; all to the irreparable harm and damage of plaintiff as below set forth.

XI.

That the wrongful seizure of plaintiff's traps and arrest of plaintiff's employees engaged in setting and maintaining said traps will result in irreparable harm and damage to the plaintiff as follows: That if the plaintiff is unable to use the four traps that it has made ready to locate at sites approved by the Secretary of the Interior, the traps will become valueless to the plaintiff with a loss to the plaintiff of about $100,000.00, which figure includes only the physical value; that 45% of the plaintiff's canned salmon production is based on trap caught salmon, and that without the use of these four traps plaintiff would be forced to drastically curtail its operation, quite likely to the point of complete shutdown; that plaintiff cannot convert to an operation completely supported by a seine fleet because (1) there are no boats available either in Alaska or in the other States (2) if boats were available there are no trained [fol. 13] crews to man them; (3) plaintiff has neither the funds nor source of funds to acquire such a fleet, if one was available; such curtailment or closure of the cannery would result in direct loss to the plaintiff of the value of the cannery and equipment which has no value other than that of a salmon cannery, in the amount of $377,000.00 and would result in plaintiff being unable to retire its current obligation of $781,000.00 to the United States, and would result in a payroll loss to the 70 to 100 employees of plain-

tiff (members of plaintiff corporation) of about $50,000.00 to $65,000.00, and would result in the loss to the plaintiff of 30% of the net profits of the cannery that go to its members for community advancement and improvement; that none of these direct losses can be recovered from the State of Alaska under the terms of 170 SLA 1957; that the only employment available now, and historically, to the members of the plaintiff corporation at Kake, Alaska, is in the cannery or on plaintiff's seine boats and trap servicing vessels; that this employment though of short duration constitutes the sole source of income for the calendar years for almost all of plaintiff's members; that the closure of plaintiff's cannery, or curtailment to the point where it could operate would completely wipe out the economic base of the plaintiff's members, and leave the village of Kake with no means of self support and entirely dependent upon relief dole and welfare aid; that the harm and damage that will accrue to the plaintiff and to its members thereby is beyond all calculation and extends to the very fiber of their social, economic and cultural well being, for which no measure of money damage can be fixed.

XII.

That the commercial salmon fishing season at plaintiff's trap sites commences 6:00 o'clock A. M., Wednesday, the 24th day of June, 1959; that it is necessary that the trap [fol. 14] frames and related gear be placed at the sites and made ready for operation prior to the opening time in order that no fishing time will be lost; that the season closes on the 22d of August, 1959, at 6:00 o'clock P. M. and the time lost at the opening of the season cannot be added on to the end thereof; that if plaintiff places its traps in position the defendant will cause his agents and officials to seize the traps and arrest the people involved unless restrained by order of this Court; and that for that reason it is necessary that defendant and his agents be restrained from interfering in any way with the advance placing and setting of said traps at said sites.

XIII.

That it is necessary that a temporary restraining order without notice issue upon the filing of this complaint, as prayed for herein, in order to preserve the status quo of plaintiff's rights pending the hearing on the prayer and motion for a preliminary injunction because unless restrained the defendant and his agents will make the seizures and arrests herein referred to and thereby accomplish the very wrongful act that plaintiff is seeking to restrain before a hearing can be had on this complaint for an injunction, and that as alleged herein in Paragraph XII it is necessary that plaintiff set its traps as soon as possible if it is to avoid the irreparable damage and loss that it seeks by this petition to avoid; and that the very irreparable harm and damage and loss alleged in Paragraph XI herein will take place in large part during the time that elapses from the filing of this complaint and a determination on the prayer for a preliminary injunction unless defendant is so restrained.

XIV.

That the defendant has already caused the seizure of one of plaintiff's traps located at Point Pybus and has ousted plaintiff of possession; that this trap normally accounts for [fol. 15] 50% of the plaintiff's trap caught fish production; that during the first 10 days of the season this trap normally catches about one-third (⅓) of its total production; that the season opens 6:00 A. M. Wednesday, June 24, 1959; that the very irreparable harm plaintiff is seeking to have prevented pending a hearing on the merits will in an appreciable measure take place if this trap is left in the possession of the defendant until the conclusion of this suit; that if plaintiff's rights are to be preserved and the status quo maintained pending a final determination in this matter, it is essential that this trap be returned to the plaintiff forthwith; plaintiff has no other trap to utilize in its place, and the only area at Point Pybus plaintiff can use under the Secretary of the Interior's regulations is the area now occupied by the trap held by the defendant's agents.

XV.

That the plaintiff has no plain, speedy or adequate remedy at law to prevent the unlawful action of the defendant and his agents.

Wherefore, plaintiff prays as follows: That the defendant, his agents, successors, deputies, servants and employees, and all persons acting by or through or under him be perpetually enjoined from interfering in any manner with the right of the plaintiff to erect, moor, maintain, operate and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the following sites:

(1) Kake-Cape Fanshaw, located at 57° 10′ 52″ N. lat. 133° 32′ 44″ W. long.

(2) Kake-Point Pybus, located at 57° 18′ 40″ N. lat. 133° 57′ 21″ W. long.

(3) Kake-Point Macartney, located at 57° 01′ 23″ N. lat. 134° 02′ 50″ W. long.

(4) Kake-Cornwallis, located at 56° 55′ 52″ W. lat. 134° 16′ 08″ W. long.

[fol. 16] and that defendant, his agents, successors, deputies, servants and employees, and all persons acting by or through or under him be perpetually enjoined from in any manner attempting to enforce the provisions of 17 SLA 1959 or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described and that pending the filing of an answer and the hearing and determination of this action that a preliminary injunction restraining the defendant, his agents, successors, deputies, servants, and employees and all persons acting by or through or under him from interfering in any manner with the right of the plaintiff to erect, moor, maintain, operate and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the sites listed hereinabove and from

in any manner attempting to enforce the provisions of 17 SLA 1959 or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described, and further that pending the hearing thereof that a temporary restraining order issue restraining the defendant, his agent, successors, deputies, servants and employees, and all persons acting by or through or under him from interfering in any manner with the right of the plaintiff to erect, moor, maintain, operate and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the above mentioned sites, and from in any manner attempting to enforce the provisions of 17 SLA 1959 or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described, and [fol. 17] further that the defendant, his agents, servants and employees be ordered to deliver up possession to the plaintiff forthwith that certain trap fishing structure seized by the defendant's agent situate at Point Pybus, Alaska, and for such other and further relief as to the Court seems meet and equitable.

Dated at Ketchikan, Alaska, this 22d day of June, 1959.

R. L. Jernberg, C. L. Cloudy, Attorneys for Plaintiff.

Duly sworn to by Ernest Williams, Sr., jurat omitted in printing.

[fol. 18]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action File No. 8063A

THE ORGANIZED VILLAGE OF KAKE, ALASKA, Plaintiff,

vs.

WILLIAM A. EGAN, as Governor of the State of Alaska, Defendant.

AFFIDAVIT OF ERNEST WILLIAMS, SR., IN SUPPORT OF COMPLAINT FOR A TEMPORARY RESTRAINING ORDER

State of Alaska)
Ketchikan Precinct) ss:

Ernest Williams, Sr., being first duly sworn, deposes and says:

1. That the plaintiff, the Organized Village of Kake, Alaska, is a Federal chartered Indian Corporation under the Indian Reorganization Act of June 18, 1934, as amended, and that its charter was duly approved by the Secretary of the Interior and ratified by the members of the association.

2. That affiant is the president of the council, the governing body of said Organized Village of Kake, Alaska, and is duly authorized by said council to make this affidavit.

3. That the Organized Village of Kake, Alaska, is located on the west coast of Kupreanof Island, approximately 100 miles southerly from Juneau, Alaska. That the community has a population of 400 persons, all of whom are Native Alaska Indians of the Thlinget tribe. That the entire adult population is wholly dependent upon the salmon fishery, as primary fishermen, and workers in and about the salmon [fol. 19] cannery at Kake, Alaska.

4. The United States is the owner of the Kake cannery and the Organized Village of Kake, Alaska, is the beneficial owner thereof, its buildings, machinery, equipment, and floating fish traps.

5. That the United States, as aforesaid, is the owner of all of said cannery and fish traps, by virtue of a conveyance to the United States, in trust for the Organized Village of Kake, from P. E. Harris and Company, on February 10, 1950, and owner of the War Department and Forest Service permits for said traps.

That, by virtue of a purchase loan agreement, the United States has required the Organized Village of Kake to reimburse it for the cost of said cannery, equipment and fish traps, plus additional loans and advances made since 1950. That the earnings of the Kake cannery are handled under the supervision of the United States, and are distributed as follows: Debt retirement, funding for operations, reserve for depreciation and improvements, for social, educational and relief purposes, and dividends to members, provided the Organized Village of Kake is not indebted to the United States. That 25% of the net profits from the cannery operations, before costs of administration are paid, are given to Kake for public works and other improvements in the village; and 5% of the net profits from said cannery operations, before costs of administration are paid, are allocated to Kake seine fishermen supplying fish to the cannery.

That under the loan agreement above described, the Organized Village of Kake is presently indebted to the United States in the sum of $781,872.33 which includes the sum of approximately $48,000 advanced by the United States for [fol. 20] the installation of the four fish traps for the 1959 fishing season.

6. That the Secretary of the Interior, the Honorable Fred A. Seaton, during the latter part of 1958 assured the Village of Kake it could install floating fish traps, and by virtue of this and other official releases and notices preparations were made for the 1959 season, including the borrowing of money from the United States for the purchase of materials for the traps. That on March 19, 1959, the Secre-

tary of the Interior issued a regulation in the Federal Register, numbered 115.26, stating that

"Salmon traps owned and operated by native Indian communities may be operated in 1959 at the following sites:

(b) Organized Village of Kake

(1) Kake-Cape Fanshaw, located at 57°10′52″ N. lat. 133°32′44″ W. long.

(2) Kake-Point Pybus, located at 57°18′40″ N. lat. 133°57′21″ W. long.

(3) Kake-Point Macartney, located at 57°01′23″ N. lat. 134°02′50″ W. long.

(4) Kake-Cornwallis, located at 56°55′52″ N. lat. 134° 16′08″ W. long.

7. That the money invested in equipping the four traps, as mentioned in paragraph 5 above, if the Village of Kake is deprived the use of the traps, cannot be recovered. That the traps are made up and readied for operation, and the materials therein would be rendered valueless if the traps had to be dismantled, as the components, such as wire mesh, webbing, labor, etc., would be unsalvageable. In addition thereto there will be not less than a 45% loss of production of fish which cannot otherwise be recovered. All available seine boats have been utilized in the past, and it is quite unlikely there would be any substantial increase in their catches. There is a great lack of seine boats in Alaska, and none could be built or manned within the brief time re- [fol. 21] maining before the season opens. That the loss of use of traps means fewer cases of salmon will be produced, and the cannery, which is practically the sole means of support for the Kake natives, will be forced to cut employment. That the loss of production normally enjoyed from the traps could conceivably result in a partial or complete closure of the cannery. That there is no provision in law for the extension of the salmon fishing season whereby the Kake Organized Village, if the said fish traps are not allowed to fish with the result the production would be de-

pendent upon the catches from the members' 16 seine boats, could possibly recapture the loss the banning of said traps would create.

8. That on or about June 5, 1959, the State of Alaska notified the Organized Village of Kake that it could not install or operate the fish traps above mentioned, and that it would arrest and attempt to obtain the conviction of anyone who attempted to install said traps under an alleged criminal statute of the State of Alaska; and, that on June 17, 1959, the Organized Village of Kake, pursuant to the authority granted by the Congress of the United States, the Secretary of the Interior, the Statehood Act and the Constitution of Alaska, attempted to moor a trap at Pybus Point, Alaska, and was prevented from doing so by seven or more fish and game agents, tax collector, or state police (all of whom affiant believes were agents and representatives of the State of Alaska and its Governor), when said officials placed affiant under arrest on the charge of violating Chapter 17, Session Laws of Alaska, 1959, which criminal charge affiant is informed is pending in the District Court at Juneau; and, that immediately following said arrest of affiant said officers took possession of said trap and have retained possession thereof continuously since June 17, 1959.

That the aforesaid threatened action by the State of [fol. 22] Alaska and the aforesaid arrest of affiant and seizure, has interfered with the fishing rights of the Organized Village of Kake and has prevented and will prevent the installation and operation of its fish traps, all of which has caused the Organized Village of Kake irreparable injury and damage for which there is a lack of legal remedy, as affiant verily believes.

9. That the Indian Reorganization Act of June 18, 1934, as applied to Alaska and to the plaintiff, has looked toward the creation of a solid fishing economy benefiting the Indians and the members of the plaintiff corporation; that it has been applied through use of the cooperative fishing and processing venture in an effort to raise the standard of living above that of a mere subsistence level; that the choice of creating a solid fishing economy, over that of some

other type of economy was determined by the physical location of plaintiff's village, the resources available to it, and the capacities and capabilities of its members; that no other economic base has been established nor has any type of economic base appeared available and suitable to our needs or abilities; that the members of the plaintiff corporation are incapable, through no fault of their own, of finding and placing in operation a substitute base of economy; that it is the understanding of myself and the members of the plaintiff corporation that the decision of the Secretary of the Interior to allow the plaintiff to utilize the trap sites herein involved was based (in addition to legal principles) upon a continuing fulfillment of a plan to create a sound fishing economy for us; that the loss of these trap sites and the right to fish them and the resultant closure of our cannery (or the curtailing of operation to a point where its benefits become insignificant) operation will wipe out all advances we have made toward establishing ourselves within a strong social and economic framework of living and will leave us with no avenue of escape from a lifetime of dependence upon public relief.

[fol. 23] 10. That the State of Alaska will suffer no damage from the granting of a temporary restraining order.

Ernest Williams, Sr.

Subscribed and sworn to before me this 22d day of June, 1959.

Robert L. Jernberg, Notary Public for Alaska,
My commission expires: April 29, 1961.

(Seal)

[fol. 24]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8063A

THE ORGANIZED VILLAGE OF KAKE ALASKA, Plaintiff,

vs.

WILLIAM A. EGAN, as Governor of the State of Alaska, Defendant.

AFFIDAVIT OF J. D. THOMPSON IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

State of Alaska)
Ketchikan Precinct) ss:

J. D. Thompson, being first duly sworn, on oath deposes and says:

1. That he is the manager of the cannery for the Organized Village of Kake which is located at Kake, Alaska, and does business under the name and style of Keku Canning Company. That he has been connected with said cannery for the Organized Village of Kake since 1956. That in his capacity as manager he has charge and custody of all the records of said cannery and has personal knowledge thereof, and of matters transpired and existing between Kake and the United States.

2. That the United States on February 15, 1950, purchased from P. E. Harris and Company the cannery at Kake which included lands, buildings, machinery, equipment, floating equipment, supplies, fish traps, fish trap sites, rights, privileges and appurtenances, in trust for the Organized Village of Kake.

That the United States paid the sellers the sum of [fol. 25] $363,360.49 for the above mentioned properties, and Kake entered into a purchase loan agreement with the

United States whereby the latter would be reimbursed out of cannery earnings, together with interest at the rate of 2% per annum. That the United States also agreed to finance Kake's operation of said cannery, and has done so annually since 1950, and the total indebtedness of Kake to the United States is presently $781,872.33. That the present value of said properties is $377,218.45.

That Kake has been preparing for the 1959 salmon season since the winter and spring of 1958-59, including the purchase of materials and labor to ready Kake's four (4) floating fish traps for the season, which opens on June 24, 1959. That the money so expended on said fish traps has been advanced by the United States under said loan agreement, and amounts to approximately $50,000, which Kake is obligated to repay.

That the disbursement of all funds by Kake is subject to prior authorization being given by the United States, and the United States retains and exercises supervisory authority over all transactions respecting said cannery. That the employment of counsel in this case was made upon the aƒ ρroval of the Secretary of the Interior.

That the value of the trap frames, anchors, and gear, ready to fish, is approximately $25,000 each, or a total of $100,000 for the four traps involved. That the salvage value, if the native traps are abolished, would be almost nothing, due to the fact there is no other use for them besides fishing, and non-native traps have been banned, thereby eliminating the market for such gear. The wire mesh, cables, webbing, nails, bolts, staples and appurtenances would not be salvageable, and the remaining parts, namely, the logs and anchors, would be of little value.

That, while the factors may vary with each annual sal- [fol. 26] mon season, generally it is necessary to can about 35,000 cases before the cannery can expect a profit. That in order to reach even a goal of 35,000 cases intensive fishing by a large amount of fish catching gear, is required.

That during the 1958 season approximately 45% of the cannery pack was produced by its four floating fish traps, and 55% was produced by the seine boats. That the elimination of the four traps would require, according to the experience of 1958, about 12 additional seine boats. That

seine boats cost between $30,000 and $60,000 each, and according to affiant's understanding seine boats are unavailable either in Alaska or in the Puget Sound area, and if they were it is common knowledge that experienced fishermen are not. That while the United States has and does make loans to Kake for cannery operations, it does not authorize the purchase, and has specifically prohibited the purchase of seine boats. That affiant believes the financial condition of the cannery is such that there are no sources of financing available to it for this purpose.

That the Organized Village of Kake is the permittee of the U. S. Forest Service, which permits it to use certain of the Tongass National Forest lands for tailholds for said fish traps. That, also, Kake has been licensed by the U. S. Corps of Engineers to moor and install fish traps in the navigable waters.

That the Organized Village of Kake is and has been immune from raw fish taxes, and fish trap license taxes which were imposed on non-native fish trap operators by the Territory of Alaska, and the new State of Alaska, by virtue of Kake's status as an instrumentality of the United States. That the Territory of Alaska, and the now State of Alaska, has never regulated or attempted to regulate fish traps.

That Kake in the operation of said fish traps has abided by all conservation directives of the U. S. Fish & Wildlife Service, and in 1953 it voluntarily reduced its trap production by 50%.

[fol. 27] That the population of Kake is approximately 400, all of whom are members of the plaintiff corporation; that the entire community is dependent upon fishing; that approximately 50 women and 10 men are employed in the cannery during the canning season; that 25 men are employed in pre-season work on fish traps and the cannery; that the Kake fishermen operate 23 seine boats serving the cannery, and the community's lessee operates 20 seine boats; that the number of Kake members involved in seining is 115, or 175 Kake members in all are identified with the cannery operations. That the cannery workers receive approximately $75,000 annually in wages, and the seine fishermen receive about $115,000 annually.

That the elimination of the four traps would obviously critically reduce production of canned salmon, and, as the manager for the Kake cannery, affiant could not recommend operation of the cannery with only 23 seine boats, based on experience of the past several seasons. That the result of closure would be the loss of employment and income, community improvements, and of more importance the interest and desire for betterment that the Kake Indians have developed from their beneficial ownership of and participation in the affairs of the cannery.

That on April 6, 1959, the cannery, as it is required so to do, notified the U. S. Bureau of Commercial Fisheries that it would install for operation during the 1959 salmon fishing season its four fish traps, under the authority granted by the Secretary of the Interior, as set forth in the Federal Register for March 19, 1959, at page 2069.

That the four floating fish traps are ready to be moved to said sites and to fish on June 24, 1959, however, the Organized Village of Kake and affiant have received notice officially and through news media that the State of Alaska [fol. 28] would prevent fishing by traps by filing criminal charges; and, that affiant has knowledge of the occurrences involving the Pybus Point trap, installed by the Organized Village of Kake, wherein the State of Alaska on June 17, 1959, arrested the president of the village council and others for alleged violations of a state law prohibiting the installation of traps.

That during my tenure as cannery manager at Kake, I have read and have knowledge of each annual issue of the commercial fishery regulations promulgated by the Secretary of the Interior, and the 1959 regulations contained the first reference, to my knowledge, to regulations relating to native fish traps.

J. D. Thompson

Subscribed and sworn to before me this 22d day of June, 1959.

Robert L. Jernberg, Notary Public for Alaska.
My commission expires: April 29, 1961.

(Seal)

[fol. 29]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE, AT KETCHIKAN

Civil Action File No. 8064A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

vs.

WILLIAM A. EGAN, as Governor of the State of Alaska, Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF—June 22, 1959

Comes now the plaintiff and for cause of suit alleges:

I.

That the plaintiff is a Federal corporation, chartered as an organized Indian village under the laws of the United States of America, which charter was ratified according to law under date of November 15, 1939, and is authorized by said charter to sue and be sued in courts of competent jurisdiction. That said village is located at Angoon, Alaska; that said corporation is a membership corporation whose membership is that of the entire village; presently numbering 306 people; that the members thereof are of the Thlinget Indian Tribe; that the United States Department of Interior has authorized the institution of this suit by the plaintiff and the retention of counsel by the plaintiff for that purpose.

II.

That in March, 1948, plaintiff commenced doing business as Hood Bay Salmon Company after the United States of America acquired title in its own name as trustee for the plaintiff to certain salmon cannery property located on U. S. S. 1480, Hood Bay, Alaska, including, but not limited to, cannery buildings, canning equipment, ware-

[fol. 30] houses, docks, floats, outbuildings, boats, four fish trap sites and the assignment of War Department Permits therefor, four "tailhold" and "watchman cabin" sites and assignment of United States Forest Service Use Permits therefor, trap brailing tenders, trap setting tenders and rigging scows and all other equipment normally associated with the acquisition and processing of fish caught by a floating fish trap. That said purchase and acquisition was by the United States of America acting through the Department of Interior and the Acts of Congress, and pursuant thereto the funds necessary to accomplish said acquisition were supplied by the United States of America in the amount of $260,000.00, and said property has a present day book value of $207,000.00.

III.

That since March, 1948, plaintiff has, as beneficial owner, to the date of this complaint, continuously operated its cannery and fished its trap sites (during seasons prescribed by law) in pursuit of the purposes for which it was organized as a federal chartered Indian corporation, with the exception that during the past few years of declining salmon runs, the plaintiff has, as a party to a general agreement among the salmon industry in Alaska, restricted its use of its sites so as to use less than all of the four sites from year to year.

IV.

That since March, 1948, the funds for operation of said cannery, setting and fishing of the traps, etc., have been supplied by the United States of America; that during this period the plaintiff has paid no tax to the Territory of Alaska based upon operation of fish traps or the packing of salmon for commercial purposes by reason of the fact that it claimed exemption as a federal chartered Indian corporation, an instrumentality of the federal government, and therefore exempt from taxation by the Territory.

[fol. 31]

V.

That the operation of the cannery and utilization of the fish trap sites mentioned was undertaken by the plaintiff

for the purpose of furnishing employment for the members of the Angoon Community Association to provide a means of allowing them to have their social and welfare needs advanced through use of profits obtained from the operation, all designed to promise the advancement of the people of the said Community in a manner compatible with the intention of the Congress of the United States to care and provide for the social and economic welfare of the Indian.

VI.

That on or about November 14, 1958, the Secretary of the Interior published in the Federal Register (23 F.R. 8874) a notice that he intended to amend the then existing regulations governing fishing for or taking species of commercial fish and shellfish in the waters of Alaska, and that it was proposed to prohibit the taking of fish in Alaska waters by use of fish traps except insofar as certain Indian tribes or villages were concerned; that on March 7, 1959, the said Secretary of Interior published his amendments to the fishing regulations in 24 F.R. 2053, and therein prohibited the taking of fish in Alaska waters by use of fish traps, except that such taking would be allowed with respect to trap sites owned, among others, by the Angoon Community Association, plaintiff herein, therein described as follows:

(1) Angoon-Basket Bay, located at 57°26′16″ N. lat. 134°51′34″ W. long.

(2) Angoon-Eagle Island, located at 57°22′28′ N. lat. 134°34′18″ W. long.

(3) Angoon-Point Caution, located at 57°13′152″ N. lat. [fol. 32] 134°39′05″ W. long.

VII.

That on or about March 10, 1959, Elmer Bennett, the then acting Secretary of the Interior advised James E. Hawkins, Area Director, Alaska Native Service, Juneau, Alaska, that pursuant to the disclaimer of Indian fishing rights made by the State of Alaska, upon admission to

the Union, and pursuant to the long-standing supervisory control exercised by the United States for the protection of the Indians, the regulations for fishing in Alaska for 1959 would permit the operation of traps by the plaintiff (among others) and that therefore the plaintiff (among others) could proceed to make plans for operation of their salmon canneries in 1959 on the basis that they would be allowed to continue the use of such traps as designated by the Secretary; that this information was transmitted by James E. Hawkins to the plaintiff herein under date of March 16; that pursuant to the information therein contained the plaintiff then undertook to ready itself to operate its cannery for the 1959 season based upon the operation of three trap sites; that pursuant thereto, plaintiff notified the Acting Regional Director of the Bureau of Commercial Fisheries, Juneau, Alaska, under date of April 1, 1959, the plaintiff was going to operate the three above described trap sites.

VIII.

That on or about May 21, 1959, the defendant, William A. Egan as Governor for the State of Alaska made public his intent to seek enforcement of a Statute of the State of Alaska, identified as 17 SLA 1959, stating that said statute prohibited the use of fish traps in Alaska, and that it made it a crime subject to fine and imprisonment to violate the provisions thereof and stating further that the third ordinance of the Constitution of Alaska prohibit the plaintiff's use of fish traps, and that the police power of the State of Alaska prohibited said use; thereafter the said defendant on numerous occasions, in newspapers and in personal appearances before the public, including appear-[fol. 33] ances before the Council of the plaintiff stated that if the plaintiff installed its traps that the State of Alaska would seize them, arrest the persons who installed and maintained them, and take such other actions as he deemed appropriate to the alleged violation of law; these threats were also made by agents of the defendant William A. Egan acting on his behalf directly to the plaintiff's council on a number of occasions and to the attorneys retained to

represent the plaintiff's interests; that on or about the 15th day of June, 1959, The Organized Village of Kake, Alaska d/b/a Keku Canning Company, set one of its trap frames at a site allotted to it by the Secretary of the Interior at Pybus Point, Alaska, and thereafter the defendant, William A. Egan, carried out his threat and caused the law enforcement officers of the State of Alaska to arrest the President of the Council of said Organized Village of Kake, Alaska, and the foreman of the crew that set the trap, and caused informations to be filed against them in this Court, and further that said trap has been seized and possessed by these law enforcement officials acting under direct authority of said defendant William A. Egan.

IX.

That the action heretofore taken by the said defendant and his agents, and the action threatened to be taken is wrongful and in violation of the laws of the United States of America, and in violation of the Constitution of the United States of America, and in violation of the Constitution of the State of Alaska, for the following reasons, and such other reasons as will be brought forth at trial of this cause, to-wit:

1. That the laws of the United States of America prevent the State of Alaska, or any officer or agent thereof from exercising any control over the super-
[fol. 34] vision and management of the fish and wildlife in Alaska at this time (Section 6e Statehood Act, 72 Stat. 339, Section 6e).

2. The laws of the United States of America (Section 4 Statehood Act, 72 Stat. 339, Sec. 4) and the Constitution of the State of Alaska (Article 12 Section 12) prevent the State of Alaska from interfering with the control and management of Indian fishing rights held either by the Indians or held by the United States of America in trust for Indians, at any time, now or in the future.

3. The regulations issued by the Secretary of Interior (24 F.R. 2053, et seq.) March 7, 1959, allowing

the plaintiff to operate and utilize three fish traps at the sites noted hereinabove constitute an exercise by the United States of its exclusive power both over the whole Alaska Fisheries and over the fishing rights of Indians.

4. The commerce clause of the Constitution of the United States of America places the regulation of the social and economic welfare of Indians, as well as the regulation of fish and wildlife resources of the United States exclusively within the power of Congress of the United States.

5. That the statute under which defendant claims his authority (17 SLA 1959), the claimed constitutional mandate (Ordinance #3), and the general claim of police power are all repugnant to the principles and laws above stated and therefore are in violation of the laws of the United States, the Constitution of Alaska and Constitution of the United States of America and are therefore void and of no force and effect.

[fol. 35]

X.

That unless the Court prevents the defendant from so doing by its power of injunction, the defendant will cause his agents and law enforcement officials to seize the plaintiff's traps, arrest the people employed by plaintiff to erect and maintain said traps, every time the plaintiff seeks to place and fish such trap or traps pursuant to the regulations issued by the Secretary of Interior as above mentioned; all to the irreparable harm and damage of plaintiff as below set forth.

XI.

That the wrongful seizure of plaintiff's traps and arrest of plaintiff's employees engaged in setting and maintaining said traps will result in irreparable harm and damage to the plaintiff as follows: That if the plaintiff is unable to use the three traps that it has made ready to locate at sites approved by the Secretary of the Interior, the traps will become valueless to the plaintiff with a loss to the plain-

tiff of about $67,500.00, which figure includes only the physical value, that 30% of the plaintiff's canned salmon production is based on trap caught salmon, and that without the use of these three traps plaintiff would be forced to drastically curtail its operation, quite likely to the point of complete shutdown; that plaintiff cannot convert to an operation completely supported by a seine fleet because (1) there are no boats available either in Alaska or in the other states (2) if boats were available there are no trained crews to man them (3) plaintiff has neither the funds nor source of funds to acquire such a fleet, if one was available; such curtailment or closure of the cannery would result in direct loss to the plaintiff of the value of the cannery and equipment which has no value other than that of a salmon cannery, in the amount of $207,000.00 and would result in plaintiff being unable to retire its current obligation of [fol. 36] $848,000.00 to the United States, and would result in a payroll loss to the 70 to 100 employees of the plaintiff (members of the plaintiff corporation) of about $50,000.00 to $65,000.00, and would result in the loss to the plaintiff of 30% of the net profits of the cannery that go to its members for community advancement and improvement; that none of these direct losses can be recovered from the State of Alaska under the terms of 170 SLA 1957; that the only employment available now, and historically, to the members of the plaintiff corporation at Angoon Alaska, is in the cannery or on plaintiff's seine boats and trap servicing vessels; that this employment though of short duration constitutes the sole source of income for the calendar year for almost all of plaintiff's members, that the closure of plaintiff's cannery, or curtailment to the point where it could operate would completely wipe out the economic base of the plaintiff's members, and leave the community of Angoon with no means of self support and entirely dependent upon relief dole and welfare aid; that the harm and damage that will accrue to the plaintiff and to its members thereby is beyond all calculation and extends to the very fiber of their social, economic and cultural well being, for which no measure of money damages can be fixed.

XII.

That the commercial salmon fishing season at plaintiff's trap sites commences 6:00 o'clock A.M., Wednesday, the 24th day of June, 1959; that it is necessary that the trap frames and related gear be placed at the sites and made ready for operation prior to the opening time in order that no fishing time will be lost; that the season closes on the 22nd day of August, 1959, at 6:00 o'clock P.M., and the time lost at the opening of the season cannot be added on to the end thereof; that if plaintiff places its traps [fol. 37] in position the defendant will cause his agents and officials to seize the traps and arrest the people involved unless restrained by order of this Court; and that for that reason it is necessary that defendant and his agents be restrained from interfering in any way with the advance placing and setting of said traps at said sites.

XIII.

That it is necessary that a temporary restraining order without notice issue upon the filing of this complaint, as prayed for herein, in order to preserve the status quo of plaintiff's rights pending the hearing on the prayer and motion for a preliminary injunction because unless restrained the defendant and his agents will make the seizures and arrests herein referred to and thereby accomplish the very wrongful act that plaintiff is seeking to restrain before a hearing can be had on this complaint for an injunction, and that as alleged herein in Paragraph XII it is necessary that plaintiff set its traps as soon as possible if it is to avoid the irreparable damage and loss that it seeks by this petition to avoid; and that the very irreparable harm and damage and loss alleged in Paragraph XI herein will take place in large part during the time that elapses from the filing of this complaint and a determination on the prayer for a preliminary injunction unless defendant is so restrained.

XIV.

That the plaintiff has no plain, speedy or adequate remedy at law to prevent the unlawful action of the defendant and his agents.

Wherefore, Plaintiff prays as follows: That the defendant, his agents, successors, deputies, servants and employees, and all persons acting by or through or under him be perpetually enjoined from interfering in any manner with the right of the plaintiff to erect, moor, maintain, [fol. 38] operate and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the following sites:

(1) Angoon-Basket Bay, located at 57°36'16" N. lat. 134°51'34" W. long.

(2) Angoon-Eagle Island, located at 57°22'28" N. lat. 134°34'18" W. long.

(3) Angoon-Point Caution, located at 57°13'52" N. lat. 134°39'05" W. long.,

and that defendant, his agents, successors, deputies, servants and employees, and all persons acting by or through or under him be perpetually enjoined from in any manner attempting to enforce the provisions of 17 SLA 1959 or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described and that pending the filing of an answer and the hearing and determination of this action that a preliminary injunction restraining the defendant, his agents, successors, deputies, servants, and employees and all persons acting by or through or under him from interfering in any manner with the right of the plaintiff to erect, moor, maintain, operate and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the sites listed hereinabove and from in any manner attempting to enforce the provisions of 17 SLA 1959 or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described, and further that pending the hearing thereof that a restraining order issue restraining the de-

fendant, his agents, successors, deputies, servants and em-
[fol. 39] ployees, and all persons acting by or through or under him be perpetually enjoined from interfering in any manner with the right of the plaintiff to erect, moor, maintain, operate and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the above mentioned sites, and from in any manner attempting to enforce the provisions of 17 SLA 1959 or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described. And that this Court declare 17 SLA 1959, the Third Ordinance of the Constitution of Alaska, and all other State laws relied upon by the defendant in support of his interference with plaintiff's right of fishery, void and of no force and effect insofar as their application extends to control, management, or restriction of plaintiff's right of fishery, and for such other and further relief as to the Court seem meet and equitable.

Dated at Ketchikan, Alaska, this 22d day of June, 1959.

R. L. Jernberg, C. L. Cloudy, Attorneys for Plaintiff.

Duly sworn to by Samuel G. Johnson, jurat omitted in printing.

[fol. 40]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action File No. 8064A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

v.

WILLIAM A. EGAN, as Governor of the State of Alaska, Defendant.

AFFIDAVIT OF ALBERT THOMPSON, IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

State of Alaska)
) ss:
Ketchikan Precinct)

Albert Thompson, being first duly sworn, on oath deposes and says:

1. That he is the manager of the cannery for the Angoon Community Association, which is located at Hood Bay, Alaska, and does business under the name and style of Hood Bay Salmon Company. That he has been in charge of said cannery for the association since 1948. That in his capacity as manager he has charge and custody of all the records of said cannery and has personal knowledge thereof; and of matters transpired and existing between the Association and the United States.

2. That the United States on March 24, 1948, purchased from August Buschmann, H. A. Fleager and Arthur P. Wolf the cannery at Hood Bay, which included lands, buildings, machinery, equipment, floating equipment, supplies, fish traps, fish trap sites, rights, privileges and appurtenances, in trust for the Angoon Community Association. That the United States paid the sellers the sum of $260,000 for the above mentioned properties, and the Associa-
[fol. 41] tion entered into a purchase loan agreement with the United States whereby the latter would be reimbursed out of cannery earnings, together with interest at the rate

of 2% per annum. That the United States, also agreed to finance the Association's operation of said cannery, and has done so annually since 1948, and the total indebtedness of the Association to the United States is presently $848,-446.91. That the present value of said properties is $207,096.13.

That the Association has been preparing for the 1959 salmon season since the winter and spring of 1958-59, including the purchase of materials and labor to ready the Association's three (3) floating fish traps for the season which opens on June 24, 1959. That the money so expended on said fish traps has been advanced by the United States under said loan agreement, and amounts to approximately $30,000 which the Association is obligated to repay.

That the disbursement of all funds by the Association is subject to prior authorization being given by the United States, and the United States retains and exercises supervisory authority over all transactions respecting said cannery. That the employment of counsel in this case was made upon the approval of the Secretary of the Interior.

That the value of the trap frames, anchors, and gear, ready to fish, is approximately $22,500 each, or a total of $67,500 for the three traps involved. That the salvage value, if the native traps are abolished, would be almost nothing, due to the fact there is no other use for them besides fishing, and non-native traps have been banned, thereby eliminating the market for such gear. The wire mesh, cables, webbing, nails, bolts, staples and appurtenances would not be salvageable, and the remaining parts, namely, the logs and anchors, would be of little value.

[fol. 42] That, while the factors may vary with each annual salmon season, generally it is necessary to can about 32,000 cases before the cannery can expect a profit. That in order to reach even a goal of 32,000 cases intensive fishing by a large amount of fish catching gear is required. That during the 1958 season approximately 28% of the Association's pack was produced by its three floating fish traps, and 72% was produced by the members' 16 seine boats. That the elimination of the three traps would require, according to the experience of 1958, about 9 additional seine boats. That seine boats cost between $30,000 and $60,000 each, and according to Affiant's understanding

seine boats are unavailable either in Alaska or in the Puget Sound area, and if there were it is common knowledge that experienced fishermen are not. That while the United States has and does make the Association loans for cannery operations, it does not authorize the purchase, and has specifically prohibited the purchase of seine boats. That affiant believes the financial condition of the cannery is such that there are no sources of financing available to it for this purpose.

That the Angoon Community Association is the permittee of the U. S. Forest Service, which permits said Association to use certain of the Tongass National Forest lands for tailholds for said fish traps. That, also, the Association has been licensed by the U. S. Corps of Engineers to moor and install fish traps in the navigable waters.

That the Association is and has been immune from raw fish taxes and fish trap license taxes which were imposed on non-native fish trap operators by the Territory of Alaska, and the now State of Alaska, by virtue of the Association's status as an instrumentality of the United States. That the Territory of Alaska, and the now State of Alaska, has never regulated or attempted to regulate fish traps.

[fol. 43] That the Association in the operation of said fish traps has abided by all conservation directives of the U. S. Fish & Wildlife Service, and the Association in 1953 voluntarily reduced its trap production capacity by 50%.

That the population of Angoon is approximately 306, all of whom are members of the plaintiff corporation, and each year men, women and children migrate from their village to the cannery at Hood Bay, where individual quarters and family dwellings are provided them. That pre-season preparations of the traps and cannery creates employment of about 20 men; that during the season about 14 men and 64 women are employed in the cannery, and about 80 men are working on seine boats. That the wages earned by cannery employees approximate $75,000 annually, and the earnings from the cannery and fishing provides all of the income these natives enjoy.

That the elimination of the three traps would obviously critically reduce production of canned salmon, and as the

manager for the Association affiant could not recommend operation of the cannery with 16 seine boats, based on experience of the past several seasons. That the result of closure would be the loss of employment and income, community improvements and of more importance the interest and desire for betterment that the Angoon Indians have developed from their beneficial ownership of and participation in the affairs of the Hood Bay cannery.

That on April 6, 1959, the cannery, as it is required so to do, notified the U. S. Bureau of Commercial Fisheries that it would install for operation during the 1959 salmon fishing season the following named fish traps, Point Caution #1, Eagle Island #2, and Basket Bay #3, under the authority granted by the Secretary of the Interior, as set forth in the Federal Register for March 19, 1959, at page 2069.

[fol. 44] That the floating fish traps above mentioned are ready to be moved to said sites and to fish on June 24, 1959, however, the Association and affiant have received notice officially and through news media that the State of Alaska would prevent fishing by traps by filing criminal charges; and, that affiant has knowledge of the occurrences involving the Pybus Point trap, installed by the Organized Village of Kake, wherein the State of Alaska, on June 17, 1959, arrested the president of the village council and others for alleged violations of a state law prohibiting the installation of traps.

That during my tenure as cannery manager for the Angoon Community Association, which commenced in 1948, I have read and studied each annual issue of the commercial fishery regulations promulgated by the Secretary of the Interior, and the 1959 regulations contained the first reference, to my knowledge, to regulations relating to native fish traps.

Albert Thompson

Subscribed and sworn to before me this 22d day of June, 1959.

Robert L. Jernberg, Notary Public for Alaska, My commission expires: April 29, 1961.

(Seal)

[fol. 45]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action File No. 8064A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

v.

WILLIAM A. EGAN, as Governor of the State of Alaska, Defendant.

AFFIDAVIT OF SAMUEL G. JOHNSON IN SUPPORT OF COMPLAINT FOR A TEMPORARY RESTRAINING ORDER

State of Alaska)
) ss:
Ketchikan Precinct)

Samuel G. Johnson, being first duly sworn, deposes and says:

1. That the plaintiff, the Angoon Community Association, is a Federal Chartered Indian Corporation under the Indian Reorganization Act of June 18, 1934, as amended, and that its charter was duly approved by the Secretary of the Interior and ratified by the members of the association.

2. That affiant is and has been since 1948, the president of the council, the governing body of said Angoon Community Association, and is duly authorized by said council to make this affidavit.

3. That the Angoon Community Association is located at Angoon, Alaska, which is situate on the west coast of Admiralty Island, approximately 75 miles southwesterly from Juneau, Alaska. That the community consists of 306 persons, all of whom are native Alaska Indians of the Tlinget tribe, and of whom 166 are adults and the re-
[fol. 46] mainder are children. That the entire adult population is wholly dependent upon the salmon fishery, as

primary fishermen and workers in and about the salmon cannery at Hood Bay, Alaska, a few miles southerly of Angoon. That each salmon season the entire population (excepting 22 aged and infirm natives), men, women and children, move from their homes at Angoon to the Hood Bay Cannery for the season's work, which is normally the three summer months.

4. The United States is the owner of the Hood Bay Cannery and the Angoon Community Association is the beneficial owner thereof, its buildings, machinery, equipment vessels, floating fish traps.

5. That the United States, as aforesaid, is the owner of all of said cannery and fish traps, by virtue of a conveyance to the United States, in trust for the Angoon Community Association, from August Buschmann, H. A. Fleager and Arthur P. Wolf, on March 24, 1948, and owner of the War Department and Forest Service permits for said traps. That, by virtue of a purchase loan agreement, the United States has required the Angoon Community Association to reimburse it for the cost of said cannery, equipment and fish traps, plus additional loans and advances made since 1948. That the earnings of the Hood Bay cannery are handled under the supervision of the United States, and are distributed as follows: Debt retirement, funding for operations, reserve for depreciation and improvements, for social, educational and relief purposes, and dividends to members, provided the Association is not indebted to the United States. That 25% of the net profits from the cannery operations before costs of administration are paid, are given to the Association for public works and other improvements in the Angoon village; and 5% of the net profits from said cannery operations, before costs of administration are paid, are allocated to the Association seine fishermen supplying fish to the cannery.

[fol. 47] That under the loan agreement above described, the Angoon Community Association is presently indebted to the United States for the sum of $848,446.91, which includes the sum of $30,000 advanced by the United States for the installation of the three fish traps for the 1959 fishing season.

6. That the Secretary of the Interior, the Honorable Fred A. Seaton, during the latter part of 1958, assured the Association it could install floating fish traps, and by virtue of this and other official releases and notices preparations were made for the 1959 season, including the borrowing of money from the United States for the purchase of materials for the traps. That on March 19, 1959, the Secretary of the Interior issued a regulation in the Federal Register, numbered 115.26, stating that:

"Salmon traps owned and operated by native Indian communities may be operated in 1959 at the following sites:

(c) Angoon Community Association.

(1) Angoon-Basket Bay, located at 57° 26′ 16″ N. Lat., 134° 51′ 34″ W. long.

(2) Angoon-Eagle Island, located at 57° 22′ 28″ N. Lat., 134° 34′ 18″ W. long.

(3) Angoon-Point Caution, located at 57° 13′ 52″ N. Lat., 134° 39′ 05″ long."

7. That the money invested in equipping the three traps, as mentioned in paragraph 5 above, if the community is deprived the use of the traps, cannot be recovered. That the traps are made up and readied for operation, and the materials therein would be rendered valueless if the traps had to be dismantled, as the components, such as wire mesh, webbing, labor, etc., would be unsalvageable. In addition thereto there will be not less than a 30% loss of production of fish which cannot otherwise be recovered. All available seine boats have been utilized in the past, and it is quite [fol. 48] unlikely there would be any substantial increase in their catches. There is a great lack of seine boats in Alaska, and none could be built or manned within the brief time remaining before the season opens. That the loss of use of traps means fewer cases of salmon will be produced, and the cannery, which is practically the sole means of support for the Angoon natives, will be forced to cut employment. That the loss of production normally enjoyed from the trap could conceivably result in a partial or com-

plete closure of the cannery. That there is no provision in law for the extension of the salmon fishing season whereby the Angoon Community Association, if the said fish traps are not allowed to fish with the result the production would be dependent upon the catches from the members' 16 seine boats, could possibly recapture the loss the banning of said traps would create.

8. That on or about June 5, 1959, the State of Alaska notified the Angoon Community Association that it could not install or operate the fish traps above mentioned, and that it would arrest and attempt to obtain the conviction of anyone who attempted to install said traps under an alleged State statute, and that said threatened action by the State of Alaska has interfered with the fishing rights of the Association and prevented the installation of said traps, all of which has done the Association irreparable injury and damage for which there is a lack of legal remedy, as affiant verily believes.

9. That the Indian Reorganization Act of June 18, 1934, as applied to Alaska and to the plaintiff, has looked toward the creation of a solid fishing economy benefiting the Indians and the members of the plaintiff corporation; that it has been applied through use of the cooperative fishing and processing venture in an effort to raise the standard of living above that of a mere subsistence level; that the [fol. 49] choice of creating a solid fishing economy, over that of some other type of economy was determined by the physical location of plaintiff's village, the resources available to it, and the capacities and capabilities of its members; that no other economic base has been established nor has any type of economic base appeared available and suitable to our needs or abilities; that the members of the plaintiff corporation are incapable, through no fault of their own, of finding and placing in operation a substitute base of economy; that it is the understanding of myself and the members of the plaintiff corporation that the decision of the Secretary of the Interior to allow the plaintiff to utilize the trap sites herein involved was based (in addition to legal principles) upon a continuing fulfillment of a plan to create a sound fishing economy for us; that the loss of these trap sites and the right to fish them and the re-

sultant closure of our cannery (or the curtailment of operation to a point where its benefits become insignificant) operation will wipe out all advances we have made toward establishing ourselves within a strong social and economic framework of living and will leave us with no avenue of escape from a lifetime of dependence upon public relief.

10. That the State of Alaska will suffer no damage from the granting of a temporary restraining order.

Samuel G. Johnson

Subscribed and sworn to before me this 22d day of June, 1959.

Robert L. Jernberg, Notary Public for Alaska, My commission expires: April 29, 1961.

(Seal)

[fol. 50]

MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL AND ORDER THEREON

Omitted. Printed side folio 191, page 66, supra.

[fol. 52]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action No. 8063-A

ORGANIZED VILLAGE OF KAKE, Plaintiff,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, Defendant.

MOTION TO DISMISS—June 23, 1959

Comes now the defendant, Governor of Alaska, through his attorney, the Attorney General, and moves this Court to dismiss the cause herein on the ground that the complaint fails to state a claim upon which relief may be granted.

1. The Situs of all places here involved is within Inland waters of Alaska or on the tidelands of Alaska over which the State has, in this instance, exclusive jurisdiction.

2. Plaintiff has no property right in a fish trap location.

3. The State of Alaska has authority to prohibit fish traps for use in commercial fishing.

4. The Constitution of Alaska, prohibiting fish traps without exception, has amended the White Act, 48 U. S. C. A. 221 et seq.

5. Regulation 115.26, Revised Regulations of 1959, promulgated by the Secretary of the Interior, Fred A. Seaton, is invalid.

a. Creates a discrimination not permitted under the White Act.

b. Conflicts with the Constitution of Alaska.

[fol. 53] And for such other reasons as may appear from the memorandum to be filed herein and made a part of this motion.

Dated at Juneau, Alaska, this 23rd day of June, 1959.

John L. Rader, Attorney General of Alaska, By James M. Fitzgerald, Special Assistant Attorney General.

Copy received 6-27-59
R. L. Jernberg

[fol. 54]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action No. 8064-A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, Defendant.

MOTION TO DISMISS—June 23, 1959

Comes now the defendant, Governor of Alaska, through his attorney, the Attorney General, and moves this Court to dismiss the cause herein on the ground that the complaint fails to state a claim upon which relief may be granted.

1. The situs of all places here involved is within Inland waters of Alaska or on tidelands of Alaska over which the State has, in this instance, exclusive jurisdiction.

2. Plaintiff has no property right in a fish trap location.

3. The State of Alaska has authority to prohibit fish traps for use in commercial fishing.

4. The Constitution of Alaska, prohibiting fish traps without exception, has amended the White Act, 48 U. S. C. A. 221 et seq.

5. Regulation 115.26, Revised Regulations of 1959, promulgated by the Secretary of the Interior, Fred A. Seaton, is invalid.

[fol. 55] a. Creates a discrimination not permitted under the White Act.

b. Conflicts with the Constitution of Alaska.

And for such other reasons as may appear from the memorandum to be filed herein and made a part of this motion.

Dated at Juneau, Alaska, this 23rd day of June, 1959.

John L. Rader, Attorney General of Alaska, By James M. Fitzgerald, Special Assistant Attorney General.

(Copy received 6-23-59)
R. L. Jernberg
[fol. 56]

AFFIDAVIT OF WALTER KIRKNESS

Omitted. Printed side folio 43, page 41, supra.

[fol. 58]

AFFIDAVIT OF HAAKON B. FRIELE

Omitted. Printed side folio 45, page 43, supra.

[fol. 64]

AFFIDAVIT OF CLARENCE D. PAYNE

Omitted. Printed side folio 51, page 48, supra.

[fol. 123]

AFFIDAVIT OF ALF ERICKSON

Omitted. Printed side folio 173, page 51, supra.

[fol. 124]

AFFIDAVIT OF NEIL GRANT

Omitted. Printed side folio 174, page 51, supra.

[fol. 125]

AFFIDAVIT OF HAROLD MARTINDALE

Omitted. Printed side folio 175, page 52, supra.

[fol. 126]

AFFIDAVIT OF WILLIAM E. SMITH

Omitted. Printed side folio 176, page 52, supra.

[fol. 127]

AFFIDAVIT OF PETERSBURG FISHING VESSEL OWNERS' COOPERATIVE

Omitted. Printed side folio 177, page 53, supra.

[fol. 129]

REPORTER'S TRANSCRIPT OF EXTRACT OF PROCEEDINGS—June 29, 1959

Omitted. Printed side folio 179, page 54, supra.

[fol. 132]

EXTRACT OF REPORTER'S TRANSCRIPT OF PROCEEDINGS ON JULY 1, 1959, CONTAINING APPELLANTS' ORAL NOTICE OF APPEAL

Omitted. Printed side folio 182, page 57 supra.

[fol. 133]

OPINION—Filed July 1, 1959

Omitted. Printed side folio 183, page 58, supra.

[fol. 141]

SUPPLEMENTAL FINDINGS OF FACT NOS. 1, 2 AND 3

Omitted. Printed side page 67, supra.

[fol. 143]

MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL AND ORDER THEREON

Omitted. Printed side folio 191, page 66, supra.

[fol. 145]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

No. 8063-A

In the matter of the ORGANIZED VILLAGE OF KAKE,
Plaintiff,

v.

WILLIAM A. EGAN, Defendant.

ORDER FOR DISMISSAL

This Matter having come on before the Court for final hearing on plaintiff's complaint for a permanent injunction on the 29th day of June, 1959; plaintiff appearing through its counsel, R. L. Jernberg and C. L. Cloudy, and defendant appearing through his counsel, the Attorney General for the State of Alaska, and the Court having heard oral argument and having rendered its opinion, which opinion with supplemental findings of fact is in lieu of findings of fact and conclusions of law,

It Is Therefore Ordered, Adjudged and Decreed that the complaint of the plaintiff be and it hereby is dismissed with prejudice.

Witness my hand and seal of this honorable Court this 2nd day of July, 1959.

Raymond J. Kelly, District Judge.

[fol. 146]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

No. 8064-A

In the Matter of the ANGOON COMMUNITY ASSOCIATION, Plaintiff,

v.

WILLIAM A. EGAN, Defendant.

ORDER FOR DISMISSAL

This Matter having come on before the Court for final hearing on plaintiff's complaint for a permanent injunction on the 29th day of June, 1959; plaintiff appearing through its counsel, R. L. Jernberg and C. L. Cloudy, and defendant appearing through its counsel, the Attorney General for the State of Alaska, and the Court having heard oral argument and having rendered its opinion, which opinion with supplemental findings of fact is in lieu of findings of fact and conclusions of law,

It Is Therefore Ordered, Adjudged and Decreed that the complaint of the plaintiff be and it hereby is dismissed with prejudice.

Witness my hand and seal of this honorable Court this 2nd day of July, 1959.

Raymond J. Kelly, District Judge.

[fol. 149]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

No. 8063-A

THE ORGANIZED VILLAGE OF KAKE, ALASKA

v.

WILLIAM A. EGAN, as Governor of the State of Alaska

No. 8064-A

ANGOON COMMUNITY ASSOCIATION

v.

WILLIAM A. EGAN, as Governor of the State of Alaska

JOURNAL ENTRY OF MONDAY—June 29, 1959
3:15 o'clock P.M.

At this time the hearing of this case was resumed with Mr. Fitzgerald continuing with his arguments in behalf of State of Alaska. At 4:00 p.m. there was another recess for 10 minutes, after which Mr. Fitzgerald continued his arguments. at 5:06, Mr. Cloudy, in Rebuttal raised a few Points referred to by Defendant.

Mr. R. H. Ziegler, Sr. informed the court that the matter of the Metlakatla Hearing would be ready at 1:30 P.M. tomorrow, to which the Court concurred. The same maps and exhibits are to be used, there being no objections from the present counsel in these two cases, as there will probably be an overlapping of conditions and situations.

The decision in these two cases will hold until after the hearing of the Metlakatla case.

Thereupon court adjourned till 9:30 tomorrow.

[fol. 150] AFFIDAVIT OF LT. E. L. MAYFIELD

Omitted. Printed side folio 212, page 70, supra.

[fol. 152]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action No. 8063-A

ORGANIZED VILLAGE OF KAKE, Plaintiff,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, Defendant.

Civil Action No. 8064-A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, Defendant.

MOTION TO CONSOLIDATE—June 23, 1959

Defendant moves this court for an order consolidating the above-titled cases for purposes of briefing, argument and hearing, for the reason that they involve similar questions of law and fact. That this consolidation will considerably expedite the hearings, will suit the convenience of the parties, and cause injury to no one.

Dated at Juneau, Alaska this 23 day of June, 1959.

[fol. 153] John L. Rader, Attorney General of Alaska, James M. Fitzgerald, Special Assistant Attorney General.

(Copy received 6-23-59)
R. L. Jernberg

ORDER—June 23, 1959

On motion of defendant, it is hereby ordered that the above-entitled cases be and are hereby consolidated for purposes of briefing, argument and hearing.

Dated at Juneau, Alaska, this 23rd day of June, 1959.

Raymond J. Kelly, District Judge.

[fol. 154] AFFIDAVIT OF WALTER KIRKNESS

Omitted. Printed side folio 43, page 41, supra.

[fol. 163]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

No. 8063-A

THE ORGANIZED VILLAGE OF KAKE, ALASKA, Plaintiff,

v.

WILLIAM A. EGAN, as Governor of the State of Alaska, Defendant.

No. 8064-A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

v.

WILLIAM A. EGAN, as Governor of the State of Alaska, Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS—June 23, 1959

Be It Remembered, that on the 23rd day of June, 1959, court having convened at 9:30 o'clock a.m., at Juneau, Alaska, the above-entitled cause came on for hearing; the

Honorable Raymond J. Kelly, United States District Judge, presiding; the plaintiffs appearing by R. L. Jernberg and C. L. Cloudy, their attorneys; the defendant appearing by John Rader, Attorney General of Alaska, Douglas Gregg, Assistant Attorney General, and James Fitzgerald, Special Assistant Attorney General; and at the conclusion of the hearing the Court ruled as follows:

[fol. 164] The Court: Well, this of course is a very important matter to both sides, and in a matter of such broad public interest as this which we have here, especially where we have an arm of the Federal Government opposed to the sovereign State of Alaska over the interests of a small minority of the citizens of such State, this Court must exercise great caution in interfering with the situation as it exists today at this very moment.

Now, plaintiffs state they cannot properly proceed today, and I can understand their reasons, which appear reasonable. A question of this importance must be carefully prepared and fully presented so that a complete record may be made.

As this Court was reluctant to issue any sort of a temporary restraining order herein without notice so is the Court reluctant to issue any such order which would in effect permit the installation and operation of the traps until their legal status is determined. Since the Court is willing to hear this today, and since the defendant is ready to proceed in opposing the issuance of a temporary injunction at this time, but the plaintiff cannot present their case in this regard until next Monday, this Court feels that no temporary restraining order should issue and that the hearing on the application for temporary injunction should be set for 9:30 a.m., Monday, June 29th.

I realize this action may result in the loss of a few days operation of the traps if the Court finds the injunction should issue. On the other hand, the loss to plaintiffs would be considerable also should the Court find that no injunction should issue. The plaintiff's rights are not so clear in the face of matters within the knowledge of the Court of which he is bound to take notice as to come within a situation where a clear, unclouded, unquestionable, and complete property right is about to be interfered with. The only way

this matter can be properly determined is by a complete and full hearing, and this we will have on June 29th at 9:30 a.m.

(End of Extract of Proceedings)

[fol. 165] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 229]

EXHIBIT

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25 D.C.

Air Mail

Mar 10 1959

Dear Mr. Hawkins:

The Department's press release of November 14, 1958 announced the notice of public hearing on the proposal to adopt amendments to existing regulations for the protection of commercial fisheries in Alaska, published in the Federal Register of November 14, 1958. As stated in the release, publication followed the decision on November 8 to propose elimination of all fish traps except those owned by Indian tribes or villages.

The proposal to eliminate fish traps in the pending regulations was motivated by the desire of the Department to adjust its actions as quickly as possible to the desires of the Alaskans in regard to the control of their natural resources. The people of Alaska twice voted in referendum to abolish traps.

As you know, under section 4 of the act of July 7, 1958 (72 Stat. 339) the State of Alaska disclaimed jurisdiction over any lands or other property, including fishing rights, held by any Indians, Eskimos, or Aleuts, or which is held

by the United States in trust for them, and recognized continuing federal authority thereover. This disclaimer, coupled with the longstanding supervisory control exercised for the protection of the interests of Indians, Eskimos and Aleuts by the Department of the Interior, accounts for the provision that the proposed regulations will not eliminate operation of fish traps by Indian tribes or villages. The Secretary will continue to control the operation of traps by Indian tribes and villages.

The Angoon Community Association, the Organized Village of Kake, and the Metlakatla Indian Community may proceed to make plans for operation of their salmon canneries in 1959 on the basis that they will be permitted to continue to operate the number of fish traps consistent with proper conservation practices recommended by this Department.

Sincerely yours,

/s/ Elmer F. Bennett
Secretary of the Interior

Mr. James E. Hawkins
Area Director, Juneau, Alaska

Copy to Credit and to Solicitor

[fol. 230]

EXHIBIT

PERMIT No.
WD-386 Sheet No. 9

CORPS OF ENGINEERS, U. S. ARMY
OFFICE OF THE DISTRICT ENGINEER
ALASKA DISTRICT

Anchorage, Alaska

Refer to File No. 825-91-6
(P.E. Harris Company, Inc.) 251

24 April 1950

U. S. Department of the Interior
Bureau of Indian Affairs
Alaska Native Service
Juneau, Alaska

Gentlemen:

In accordance with paragraph (b) (5) of the regulations governing the placing and maintenance of fishing structures in the coastal waters of Alaska and navigable waters tributary thereto, as approved by the Secretary of War 24 February 1947, and in accordance with your written request dated 21 April 1950, the authorization granted by the Secretary of War in permit No. WD 386 to P. E. Harris and Company, in letter from the District Engineer, Seattle, Washington, dated 24 April 1947, to construct and maintain a fish trap on Point Pybus, east shore of Admiralty Island, and in Frederick Sound, Alaska. (Latitude 57218'40"N. Longitude 133°57'21"W) is hereby transferred to the UNITED STATES OF AMERICA in trust for the ORGANIZED VILLAGE OF KAKE, ALASKA.

The conditions to which the authorization is made subject remain in full force and effect.

Very truly yours,

/s/ L. E. Seeman
L. E. SEEMAN
Colonel, CE
District Engineer

[fol. 231]

EXHIBIT

PERMIT No. WD-390 — Sheet No. 9

CORPS OF ENGINEERS, U. S. ARMY
OFFICE OF THE DISTRICT ENGINEER
ALASKA DISTRICT

ANCHORAGE, ALASKA

Reply to File No.
825-91-6 (P. E. Harris
Company, Inc.) 254 — 24 April 1950

U. S. Department of the Interior
Bureau of Indian Affairs
Alaska Native Service
Juneau, Alaska

Gentlemen:

In accordance with paragraph (b) (5) of the regulations governing the placing and maintenance of fishing structures in the coastal waters of Alaska and navigable waters tributary thereto, as approved by the Secretary of War 24 February 1947, and in accordance with your written request dated 21 April 1950, the authorization granted by the Secretary of War in permit No. WD-390 to P. E. Harris and Company, in letter from the District Engineer, Seattle, Washington, dated 24 April 1947, to construct and maintain a fish trap on Cornwallis Point, north shore Kuiu Island, and in Saginaw Bay, Alaska (Latitude 56°55'52" N., Longitude 134°16'08" W.) is hereby transferred to the UNITED STATES OF AMERICA in trust for the ORGANIZED VILLAGE OF KAKE, Alaska.

The conditions to which the authorization is made subject remain in full force and effect.

Very truly yours,

/s/ L. E. Seeman
L. E. SEEMAN
Colonel, CE
District Engineer

[fol. 232]

EXHIBIT

PERMIT No. WD-395 — Sheet No. 9

CORPS OF ENGINEERS, U. S. ARMY
OFFICE OF THE DISTRICT ENGINEER
ALASKA DISTRICT

ANCHORAGE, ALASKA

Refer to file No.
825-91-6 (P. E. Harris
Company, Inc.) 259 — 24 April 1950

U. S. Department of the Interior
Bureau of Indian Affairs
Alaska Native Service
Juneau, Alaska

Gentlemen:

In accordance with paragraph (b) (5) of the regulations governing the placing and maintenance of fishing structures in the coastal waters of Alaska and navigable waters tributary thereto, as approved by the Secretary of War 24 February 1947, and in accordance with your written request dated 21 April 1950, the authorization granted by the Secretary of War in permit No. WD-395 to P. E. Harris and Company, in letter from the District Engineer, Seattle, Washington, dated 24 April 1947, to construct and maintain a fish trap on Point Macartney, Kupreanof Island, and in Keku Strait, Alaska. (Latitude 57°01′23″ N. Longitude 134°02′50″ W) is hereby transferred to the UNITED STATES OF AMERICA in trust for the ORGANIZED VILLAGE OF KAKE, Alaska.

The conditions to which the authorization is made subject remain in full force and effect.

Very truly yours,

/s/ L. E. Seeman
L. E. SEEMAN
Colonel, GE
District Engineer

[fol. 233]

EXHIBIT

PERMIT No. WD-389 — Sheet No. 8

CORPS OF ENGINEERS, U. S. ARMY
OFFICE OF THE DISTRICT ENGINEER
ALASKA DISTRICT

ANCHORAGE, ALASKA

Refer to File No.
825-91-6 (P. E. Harris
Company, Inc.) 253 — 24 April 1950

U. S. Department of the Interior
Bureau of Indian Affairs
Alaska Native Service
Juneau, Alaska

Gentlemen:

In accordance with paragraph (b) (5) of the regulations governing the placing and maintenance of fishing structures in the coastal waters of Alaska and navigable waters tributary thereto, as approved by the Secretary of War 24 February 1947, and in accordance with your written request dated 21 April 1950, the authorization granted by the Secretary of War in permit No. WD-389 to P. E. Harris and Company, in letter from the District Engineer, Seattle, Washington, dated 24 April 1947, to construct and maintain a fish trap on the Alaska Mainland, approximately 1 nautical mile southeast of Cape Fanshaw Light and in Frederick Sound, Alaska. (Latitude 57°10'52" W., Longitude 133°32'44" W) is hereby transferred to the UNITED STATES OF AMERICA in trust for the ORGANIZED VILLAGE OF KAKE, Alaska.

The conditions to which the authorization is made subject remain in full force and effect.

Very truly yours,

/s/ L. E. Seeman
L. E. SEEMAN
Colonel, GE
District Engineer

[fol. 234]

EXHIBIT

DEED

KNOW ALL MEN BY THESE PRESENTS:

That AUGUST BUSCHMANN, H. A. FLEAGER and ARTHUR P. WOLF, co-partners doing business under the firm name and style "HOOD BAY SALMON COMPANY", as grantors, do by these presents for a valuable consideration grant, bargain, sell and convey unto the UNITED STATES OF AMERICA, Grantee, in trust for the Angoon Community Association, that certain trade and manufacturing site situated on the north shore of Hood Bay near the entrance of North Arm on Admiralty Island, being Non-Mineral United States Survey No. 1480, more particularly bounded and described as follows:

Beginning at corner No. 1, meander corner, impracticable to establish; from which U. S. Location Monument No. 1480, bears north sixty-three degrees one minute west three and twenty-nine hundredths chains distant; thence, north forty-five minutes west one and three tenths chains to witness corner to said corner No. 1, meander corner, an iron pipe four inches in diameter, thirty-six inches long, marked MC S-1480 WC COR 1 with a nail in top at correct point; five and twenty-seven hundredths chains to corner No. 2, an iron pipe four inches in diameter, thirty-six inches long, marked S1480 COR 2 with nail in top at correct point, thence, south eighty-nine degrees thirty minutes west eleven and thirty-nine hundredths chains to corner No. 3, an iron pipe three inches in diameter, thirty-six inches long, marked S1480 COR 9 with nail in top at correct point; (stamped) thence, south fifty-four degrees twenty-eight minutes west eleven and sixty-nine hundredths chains to corner No. 4, an iron pipe three inches in diameter, thirty-six inches long, marked S1480 COR 4 with nail in top at correct point; thence, south

(stamped) forty-five degrees thirty minutes east four and thirty-four hundredths chains to witness corner to corner No. 5 MC, an iron pipe three inches in diameter, thirty-six inches long, marked S1480 COR 5 MC with nail in top at correct point; five and forty-one hundredths chains to corner No. 5 MC, impracticable to establish; thence, meandering the north shore of Hood Bay at mean high tide, north fifty-five degrees fifty-two minutes east nine tenths of a chain, north fifty-seven degrees twenty-seven minutes east two and twenty-four hundredths chains, north sixty-two degrees forty-four minutes east one and seventy-three hundredths chains, north fifty-five degrees fifty-four minutes east one and forty-eight hundredths chains, north forty-five degrees eighteen minutes east one and twenty-six hundredths chains, north thirty-eight degrees six minutes east two and seventy-four hundredths chains, north sixty-four degrees twenty-two minutes east one and six tenths chains, north eighty-eight degrees forty-eight minutes east two and six hundredths chains, south seventy-one degrees fifty-five minutes east one and eighty-four hundredths chains, south seventy-four degrees forty-three minutes east four and two hundreds chains to corner No. 1 MC, the place of beginning, containing ten acres and twenty-four hundredths of an acre, according to the official plat of the Survey of the said Land, on file in the General Land Office.

SUBJECT TO: exceptions and reservations contained in United States Patent No. 1027418, Anchorage Serial No. 05521 .

together with all improvements thereon and the appurtenances thereunto belonging.

[fol. 235] TO HAVE AND TO HOLD the same unto the said United States of America and its assigns in trust for the Angoon Community Association forever. Grantors do jointly and severally, for themselves, their heirs, executors

and administrators covenant to and with the said United States and its assigns, forever, that they are lawfully and jointly seized in fee simple of the above described and granted property and premises and have a good and valid right to sell and convey the same; that said property and premises are at the time of the execution hereof, free from all encumbrances whatsoever except as provided in that certain lease to the Whiz Fish Products Company dated January 29, 1947, and except as herein stated; that they, their heirs, executors and administrators will warrant and defend the same to the said grantee and its assigns forever against the lawful claims and demands of all persons whomsoever.

IN WITNESS WHEREOF, grantors have set their hands and seals this 24th day of March, 1948.

/s/ August Buschmann (seal)

/s/ H. A. Fleager (seal)

/s/ A. P. Wolf (seal)

Co-partners doing business under the name and style "HOOD BAY SALMON COMPANY"

(Notary Seal Stamp)

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

On this day personally appeared before me AUGUST BUSCHMANN, H. A. FLEAGER and ARTHUR P. WOLF, to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 24th day of March, 1948.

/s/ David O. Hamlin
Notary Public in and for the State of Washington, residing at Seattle.

TERRITORY OF ALASKA)
JUNEAU, ALASKA) ss

The within instrument was filed for record 10:30 A.M. o'clock, April 8, 1948, and duly recorded in book 40 of Deeds on pages 378, 379 of the record of said District.

Felix Gray (ls)
District Recorder

Filing fee $3.50
Paid Collect 3.40 Recorded by ls, 11-8

[fol. 236]

EXHIBIT

DEED.

The Grantor, P. E. HARRIS & Co., a Washington corporation, for and in consideration of the sum of ONE DOLLAR ($1.00), lawful money of the United States in hand paid, and other valuable considerations, conveys and warrants to the UNITED STATES OF AMERICA in trust for the ORGANIZED VILLAGE OF KAKE, Alaska, the following described real estate located in Southeastern Alaska, to-wit:

Beginning at corner No. 1, on beach and not established, from which U. S. Location Monument F. M. R. bears north fifty-four degrees, eighteen minutes, fifty seconds west eighty-five and sixty-eight hundredths chains distant; thence north sixty-seven degrees, forty-three minutes east one and forty-six-hundredths chains to witness corner to said corner No. 1, a granite boulder, 24 x 14 x 10 inches, marked with cross (x) on top at corner point and S 963, Cor. 1 W.C., M.C., M.C.; seven and seventeen-hundredths chains to corner No. 2, a granite boulder, 22 x 12 x 5 inches, marked with cross (x) on top at corner point and S 963 Cor. 2; thence south twenty-two degrees, seventeen minutes east nineteen and three-hundredths chains to corner No. 3, a granite stone, 20 x 12 x 5 inches, marked with cross (x)

on top at corner point and S 963 Cor. 3; thence south sixty-seven degrees, forty-three minutes west six and fifty-six-hundredths chains to witness corner to corner No. 4, a granite boulder 20 x 12 x 10 inches, marked with cross (x) on top at corner point and S 963 Cor. 4 W.C., M.C.; eight and seventy-two-hundredths chains to corner No. 4, on beach and not established; thence meandering arm of Frederick Sound, north thirteen degrees, twenty-five minutes west five chains, north twenty-six degrees, fifty-one minutes west two and nine-tenths chains, north six degrees, forty-seven minutes east one chain, north forty-seven degrees, two minutes west one and six-tenths chains, north thirty degrees, forty-four minutes west four and four-tenths chains, north nine degrees, two minutes west three and nine-tenths chains, north twenty-nine degrees, fifty-eight minutes east one and two-tenths chains to corner No. 1, the place of beginning, containing fifteen and ninety-hundredths acres, according to the Official Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor-General.

This instrument is made pursuant to an agreement for the sale of properties by the Grantor to the Grantee dated December 15, 1959; this instrument being executed for recording in the Petersburg Recording District.

In Witness Whereof, said Grantor has caused these presents to be executed by its proper officers and its corporate seal to be hereunto affixed this 15th day of February, 1950.

P. E. Harris & Co.

By E. M. Brennan
Vice-President

[fol. 237] Attest:

(Darline Fravel)
Assistant Secretary (Seal)

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

On this 15th day of February, 1950, before me personally appeared E. M. BRENNAN and DARLINE FRAVEL, to me known to be the Vice-President and Assistant Secretary, respectively, of P. E. HARRIS & Co., the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

/s/ John D. Henry
Notary Public in and for the State of Washington, residing at Seattle.

FILE COPY

FILED
AUG 20 1959
JAMES R. BROWNING, Clerk

No. 226 2

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation,
Appellant,

vs.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees.*

ON APPEAL FROM THE DISTRICT COURT FOR THE STATE OF ALASKA

STATEMENT AS TO JURISDICTION

EDWARD G. DOBRIN
A. H. ZIEGLER
ROBERT H. ZIEGLER, SR.
Attorneys for Appellant.

211 Commercial Building
Ketchikan, Alaska

THE ARGUS PRESS, SEATTLE

No.....

Supreme Court of the United States

OCTOBER TERM, 1959

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation,
Appellant,

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WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees.*

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Attorneys for Appellant.

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Ketchikan, Alaska

THE ARGUS PRESS, SEATTLE

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Supreme Court of the United States

OCTOBER TERM, 1959

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, *Appellant*, vs. WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees.*	No. .....

ON APPEAL FROM THE DISTRICT COURT FOR THE STATE OF ALASKA

STATEMENT AS TO JURISDICTION

Appellant appeals from a judgment of dismissal of its complaint for injunctive relief entered by the District Court for the State of Alaska, Division Number One, Juneau, Alaska, on July 1, 1959. This Jurisdictional Statement is submitted to show that: (1) the Supreme Court has appellate jurisdiction and (2) a substantial question is herewith presented under the rules of this court.

THE OPINION BELOW

The opinion of the court below was rendered July 1, 1959, and is unreported at this time. If eventually selected for reporting, it will be reported in 18 Alaska Reports. A copy of said opinion is included in the Appendix.

JURISDICTION

1. The suit of the appellant is one to enjoin the enforcement of certain Alaska criminal statutes (17 SLA 1959, 95 SLA 1959) which purport to make it a crime for appellant and its members to erect, moor and maintain floating fish traps at sites authorized and designated by the Secretary of the Interior in the waters of Alaska. Injunction is sought on the grounds that the Alaska penal statutes, as to the appellant, are in conflict with federal statutes and regulations (which have preempted the field) and that State laws concerning fishing within the boundaries of appellant's reservation have no applicability thereto.

2. The District Court for the State of Alaska, Division Number One, Juneau, Alaska, entered judgment dismissing the complaint of appellant on July 2, 1959.

Oral notice of appeal was entered on July 1, 1959, following the rendering of the opinion upon which the judgment was later entered. Notice of appeal to the Supreme Court of the United States was filed August 6, 1959, in the District Court for the State of Alaska, Division Number One, Juneau, Alaska.

3. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 USC 1257 (1) and (2). The District Court of Alaska is the highest court of the State of Alaska in which a decision could be had. *The Coquitlam v. United States* (1896) 163 U.S. 346, 16 S.Ct. 1117, 41 L.ed. 184; *Lindeberg v. Howard* (CCA 9th 1906) 146 Fed. 467, CCA 23, 8 Ann. Cas. 709; Article XV, Section 17, Constitution of the State of Alaska. Although ap-

pellate review formerly could be had in the Court of Appeals for the Ninth Circuit, that court has decided it cannot take jurisdiction of cases decided by the District Court of Alaska after January 3, 1959. *Parker v. McCarrey,* No. 16,499 ..... F2 .....

4. The cases believed to sustain the jurisdiction of the Supreme Court are as follows:

Gully v. First National Bank (1936) 299 U.S. 109, 81 L.ed. 70, 57 S.Ct. 96;

Mallinckrodt Chemical Works v. Missouri, 238 U.S. 41, 59 L.ed. 1192;

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 73 L.ed. 184.

5. The provisions of the statutes, orders and proclamations involved are lengthy; they are set forth in the Appendix. The citations are as follows:

43 Stat. 464, 48 USC 221 (1924)

43 Stat. 464, 48 USC 222 (1924)

72 Stat. 339 (1958)

67 Stat. 29, 43 USC 1301 (1953)

67 Stat. 29, 43 USC 1313 (a), (b)

Constitution of the State of Alaska, Article XII, Section 12

48 USC 358

Title 43, USC 141

Order of the Secretary of the Interior bearing date of February 11, 1915

Presidential Proclamation No. 1332, April 28, 1916

24 F.R. 2053, 2056, Section 102.10 and 115.26

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48 Stat. 935, 25 USC 465 (1934)
73 Stat. 141 (1959)
72 Stat. 545, 18 USC 1162
62 Stat. 757, 18 USC 1151

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Is all authority to administer and manage the fish and wildlife resources of Alaska for the year 1959 reserved to the Federal Government by the terms of Section 6 (e) of the Alaska Statehood Act, 72 Stat. 339, so as to make the Alaska criminal statutes, 17 SLA 1959 as amended by 95 SLA 1959, unenforceable against the appellant by the State and its officials, and so as to make the regulations issued by the Secretary of the Interior (24 FR 2053 *et seq.*) March 7, 1959, allowing appellant to fish the trap sites therein designated a valid exercise of that authority?

2. If Section 6 (e) of the Alaska Statehood Act, 72 Stat. 339, does purport to reserve such control to the Federal Government and thereby render inapplicable the Alaska criminal statutes, does Section 6 (e) violate the "equal footing" doctrine governing the admission of new States to the Union?

3. Does the Alaska Statehood Act, 72 Stat. 339, in Section 4 thereof and in its adoption and ratification of the Alaska Constitution (in this instance specifically

Article XII, Section 12 thereof) comprehend a permanent disclaimer by the State of Alaska of control over Indian fishing within the State, and if so, is Section 4 of the Statehood Act an assumption of permanent jurisdiction (subject to further act of Congress) by the Federal Government over the location and manner of Indian fishing within the State, and further are the regulations issued by the Secretary of the Interior (24 FR 2053 *et seq.*) March 7, 1959, allowing appellant to fish the trap sites therein designated a valid exercise of that authority?

4. If the Alaska Statehood Act does so comprehend a permanent disclaimer by the State of Alaska and a permanent assumption of jurisdiction by the Federal Government, does it violate the "equal footing" doctrine governing the admission of new States to the Union?

5. Is the Alaska Statehood Act Congressional action of such a type, solely by virtue of its passage, as held by the District Court, that would eliminate and abolish that portion of the Annette Island Reserve (3000 feet of water surrounding the Island Reserve and the tidelands underlying said waters) which was established by Act of Congress (48 USC 358) in 1891, and vest title thereto, and the ownership thereof, in the State of Alaska?

6. Does the Secretary of the Interior derive his power to authorize reservation wards to fish on their reservation with designated gear and at designated locations pursuant to the provisions of the White Act (48

USC Section 221), as was held by the District Court, or does the Secretary of the Interior derive such powers from the Act of Congress establishing the Annette Island Reserve which entrusted to him the powers and duties of administering said wards (48 USC Section 358)?

7. Did the lower court err in inferentially holding that the Annette Island Reserve was not "Indian country" as defined in 18 USC Section 1151, and that, therefore, the provisions of 18 USC Section 1162 (1) were not applicable to the State of Alaska, and (2) Alaska could control and regulate by means of criminal prosecution, the fishing of the Indian wards within the boundaries of the Annette Island Reserve?

STATEMENT OF THE CASE

The Appellant Community is a federally-chartered corporation, situated within the boundaries of an Indian reservation which was created by Act of Congress in 1891 (48 USC 358); it encompassed the Annette Islands of the Alexander Archipelago in Southeastern Alaska. In 1916, by Presidential Proclamation No. 1332, the reservation was enlarged to include the waters to a distance of 3,000 feet from the shores of said islands at mean low tide in order to preserve and guarantee unto the reservation Indians a supply of fish and other acquatic products.

The Annette Island Cannery at Metlakatla is owned and operated by the appellant community; the cannery is the economic backbone of the reservation, inasmuch as salmon fishing is the only reservation industry of any

import. It packs the seine catch produced by the individual Indian fisherman; it packs the fish produced by reservation traps, the use of which has been approved at certain areas within the reservation waters by the Secretary of the Interior since at least 1915. Metlakatla has a population of approximately 1,000 people, almost all of whom, either as fishermen or cannery workers, make their livelihood from the fishing endeavor.

On July 7, 1958, Congress enacted the Alaska Statehood Act, 72 Stat. 339, under the terms of which the Alaska Constitution was ratified and affirmed. Under Section 4 of the Statehood Act, the State disclaimed all right and title to land and property which Congress reserved to the control of the United States, namely, "to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts. . . . " The Third Ordinance of the Constitution of Alaska abolished all use of fish traps in Alaska. Section 6 (e) of the Statehood Act withheld control of the Alaska fish and wildlife from Alaska until the Secretary of the Interior certified the transfer. In November, 1958, the Secretary of the Interior announced his intention to abolish fish traps in Alaska with the exception of native-owned traps. On February 25, 1959, and April 17, 1959, the legislature of Alaska enacted 17 SLA 1959 and 95 SLA 1959 making it a crime to erect, moor or maintain fish traps on or over lands or tidelands owned by the State of Alaska. On March 7, 1959, the Secretary of the Interior issued his 1959 fishing regulations for Alaska and authorized

appellant to use four (4) of its eight (8) trap sites for 1959. The Secretary of the Interior on March 10, 1959, advised appellant it could thus use its traps and could proceed to plan for the 1959 seasonal operation. On or about May 21, 1959, appellees publicly noted their intention to prevent appellant from operating its traps, and on or about June 1, 1959, appellees dispatched two patrol boats manned with armed officers of the State of Alaska to patrol near the trap sites of Kake and Angoon, other native villages whose fishing seasons opened earlier than that of appellant. On June 15, 1959, appellees caused the arrest of the President of the Council of the Village of Kake and the seizure of one of that community's fish traps. Appellees threatened to do likewise unto appellant. The appellant then sued to enjoin the enforcement of 17 SLA 1959 and 95 SLA 1959. The complaint alleged that the appellant would suffer irreparable harm, unless the appellees were restrained, for two reasons: (1) although a portion of the damages could be equated with money, the laws of Alaska prevent a suit for damages against appellees and (2) a large portion of the damages could not be equated with money. Appellant further alleged that it could not operate its cannery profitably without the use of fish traps, and that it would be forced to curtail drastically its operations, perhaps to the point of complete closure, thus causing loss of pre-season investment, loss of payroll to its members and ultimate destruction of the economy of Metlakatla and the Annette Island reserve. Appellant also alleged, *inter alia,* that the State of Alaska, lacking the statutory requirement

of ownership of lands or tidelands, could not enforce its criminal statutes against appellant or its members and that, in any event, the State of Alaska could not prosecute appellant and its members for violation of state fish and game laws, the prosecution of which would necessarily contravene the provisions of 18 USC 1162.

HOW THE FEDERAL QUESTION IS PRESENTED

Appellant based its suit on the grounds that exclusive control over the whole of the management of fish and wildlife in Alaska was reserved to the federal government for 1959, and that control over the Indian fishery was reserved to the federal government until further act of Congress; therefore, the Alaska criminal statutes were of no force and effect in view of the regulation of the Secretary of the Interior allowing appellant to fish its traps (Complaint, Tr. 12). The appellees filed a motion to dismiss appellant's complaint on the grounds it failed to state a cause of action (Tr. 41). Briefs were filed by appellant (Tr. 55) and appellees (Tr. 118), and hearing had. Upon completion thereof the District Court entered an order of dismissal of the complaint (Tr. 195) in accordance with its opinion that the Alaska criminal statutes involved were enforceable as to the appellant, that the Secretary of the Interior was without authority to allow the appellant to fish its four traps, and that the doctrine of "equal footing" gave Alaska, as a state, full control over all fishing within Alaska, federal statutes notwithstanding (Tr. 183).

In addition, appellant urged that the State of Alaska, lacking ownership of the reservation lands and tidelands, a statutory prerequisite to enforcement of its criminal statutes, could not arrest and prosecute appellant and its members (Tr. 72). Appellant likewise urged that the State of Alaska had no power to enforce its fish and game laws within the boundaries of an Indian reservation (Tr. 110). The lower court, by its decision, in effect, held that the Annette Island reserve was not "Indian Country" within the definition of 18 USC 1151 and 1162 and that, upon passage of the Statehood Act, title to the waters within the reservation and the lands thereunder vested in the new state, thus, inferentially at least, obliterating a goodly portion of the reservation (Tr. 186).

Appellant gave oral notice of appeal and thereafter filed an application for a preliminary injunction pending appeal in the Supreme Court of the United States. The injunction was granted pending filing and determination of this appeal.

THE QUESTIONS ARE SUBSTANTIAL

This appeal involves the immediate question of whether or not the appellant can fish with fish traps in Alaska when authorized so to do by the laws of the United States and when prohibited from so doing by the laws of Alaska. The resolution of this question, however, goes further and raises issues of vital importance to the future Federal-State relationships in the field of control of fish and wildlife and in the field of control of Indian welfare, especially as concerns Indian

reservations. Appellant rests its claim to fish its traps on an assertion that the federal government has exclusive power not only to provide for Indian welfare but also to exercise control over fish and wildlife of the State in providing for Indian welfare; in addition, appellant has urged that state fish and game laws, as applied to Indian country, must bow if they conflict with federal legislation on the subject. These claims have been denied by the District Court of the State of Alaska on the grounds that the Constitutional right of the State of Alaska to be admitted into the Union "on equal footing" with the other States would be infringed upon if the State were denied the right of exclusive control over its fish and wildlife and on the ground that title to a portion of the reservation of the appellant vested in the State of Alaska upon passage of the Statehood Act. The frustration of federal control over the Indian which would result from State control in this instance was not given much, if any, weight by the lower Court. The claims of right of the appellant are based directly upon the language of the Alaska Statehood Act, 72 Stat. 339, the regulations of the Secretary of the Interior issued thereunder, 24 CFR 2053-2059, 48 USC 358, the Act of 1891 which created the Annette Island reserve, and 18 USC 1151 and 1162. The language in the Statehood Act has never before been utilized in Statehood legislation; no factual background identical to ours has ever been discovered in litigation involving interpretation of statehood legislation. The far-reaching case of *Coyle v. Smith,* 221 U.S. 559, 55 L.ed. 853, and all subsequent equal footing cases whose

decisions rest thereupon, do not now foreclose inquiry into the subject issues.

Appellant seeks to restrain the enforcement of the criminal statutes of the State of Alaska. Application for injunctive relief is based upon the claim that unless the appellees are restrained, appellant will suffer irreparable harm through seizure of its equipment, loss of profits, imprisonment of its employees, loss of payroll to its members and a general emasculation of its economy, for which no action at law lies against appellees under the laws of Alaska or for which money damages would be an adequate remedy for the loss. Circumstances such as these warrant the issuance of an injunction to prevent the enforcement of the State criminal statutes involved. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 69 S.Ct. 968 (1949). Appellant's right of fishery is a property right entitled to injunctive protection, *Hynes v. Grimes Packing Co., supra.*

The Alaska Statehood Act, 72 Stat. 339, expresses a congressional intent to withhold control of the fish and wildlife resources within Alaska from the State of Alaska for the year 1959, and also to withhold such control as is necessary to allow the federal government to exercise exclusive control over Indian fishing in Alaska until such time as Congress releases that control to the State. The Act, of course, further seeks to safeguard Indian fishing rights and property rights, title to which is vested in the Indians or in the United States as Trustees for them.

Section 6(e) of the Statehood Act expressly denies to

Alaska any power of control over its fish and wildlife until certain conditions are met in "the broad national interest." The time limit therein expressed has since been defined, and federal control will cease on January 1, 1960. Congress has exercised absolute control over the fish and wildlife in Alaska since it was acquired as a Territory, and in that exercise has delegated supervision to the Secretary of the Interior under the White Act, 43 Stat. 464, 48 USC 221 (1924). Pursuant to that legislation and to the Reservation Act of 1891 (48 USC 358), the Secretary of the Interior has issued regulations from year to year governing the taking of salmon in Alaska. A violation of the regulations invokes the sanctions of the White Act, including fines, imprisonment, and seizure of equipment. The Secretary issued his 1959 regulations on or about March 7, 1959, 24 CFR 2053-2059, and therein expressly allowed appellant to fish certain traps, at the same time prescribing complete regulations for the taking of salmon in Alaska for the year 1959. Under these circumstances, no criminal statute of Alaska could have any force and effect in regulating the manner in which appellant shall fish or the gear it can utilize in the waters of Alaska this year.

Section 4 of the Statehood Act comprehends a complete reservation of control by Congress by the Federal government over Indian fishing in Alaska. This section expressly reserves to federal control "any lands or other property (including fishing rights) the right or title to which may be held by any Indians, Eskimos, or Aleuts * * * or is held by the United States in trust for said natives * * * ." Considerable speculation has been

voiced by appellees as to the intent of this section. However, the language is certainly lucid enough to indicate that Indian fishing is not to be controlled by the State until Congress otherwise directs. Similar language appears in Article XII of Section 12 of the Alaska Constitution, which is made a part of the Alaska Statehood Act by the ratification thereof in its preamble. The fact that appellant was exercising a fishing right through the use of fish traps owned by the United States, and on waters and over tidelands owned by the United States, as trustee, at the time Section 4 was enacted, does much to suggest the language of Section 4 was tailored to cover that very situation. The record is clear that the Secretary of the Interior interpreted this section of the Statehood Act to allow the appellant to continue fishing as it had in the past, subject to his regulations. This interpretation is entitled to great weight in determining what Congress intended by Section 4, if there is any ambiguity existing in the statute. *Fawcus Machine Co. v. U.S.* 282, U.S. 375.

Appellees have urged that no matter what control is withheld from Alaska by Section 6(e) or Section 4 of the Statehood Act, the Secretary of the Interior cannot specially allow the appellant to fish its traps and deny all others that right, because such action violates the White Act prohibition against the grant of an exclusive fishery by the Secretary, 43 Stat. 464, 48 USC 222. Section 4 of the Statehood Act, however, by providing specially for Indian fishing under Federal control, must be considered to have amended the White Act to that

extent. Section 6(e) declares that administration for 1959 by the Secretary must be "under existing laws." The preamble to the Statehood Act makes the Constitution of Alaska "existing law," and in so doing brings into play the language of Article XII, Section 12 of the Constitution of the State of Alaska, which also provides specially for Indian fishing, and to that extent the White Act is likewise amended, if only for the year 1959.

Congress has the right either to withhold complete control of the fish and wildlife in Alaska for the State of Alaska or to withhold such control as it deems necessary to provide for the welfare of the Indian. Neither type of withholding violates the "equal footing" doctrine. As to the Indian alone, the exclusive right of the Federal government to exercise control thereover has long been recognized as the exercise of the Constitutional power given the Federal government, and has not been considered a violation of the doctrine of "equal footing." The welfare of the Indian is not something peculiarly within the sovereignty of a State. *Coyle v. Smith, supra; U.S. v. Sandoval,* 231 U.S. 34, 58 L.ed. 107; *U.S. v. Chavez,* 290 U.S. 357. As to the complete control of fish and wildlife, the question has not been heretofore squarely presented to this Court. However, *Coyle v. Smith* clearly involves political rights in connection with "equal footing," as opposed to property rights. Regulation and management of fish and wildlife suggests a problem in property rather than in politics. The decisions of this Court in *Manchester v. Massachusetts,* 139 U.S. 240, 35 L.ed. 159, and *Skiriotes*

v. Florida, 313 U.S. 69, upholding State control of fish and wildlife, with special emphasis on the absence of conflicting federal legislation in each instance, likewise suggest that this is a field for Federal control if Congress elects to enter it.

The nature of this case and the rulings of the District Court of the State of Alaska are such as to bring the case within the jurisdictional provisions noted in Title 28 and the cases hereinbefore cited to sustain the jurisdiction. Appellant filed its case in the District Court of the State of Alaska, which is the highest court in the State of Alaska. Its complaint was based upon a right to fish certain traps pursuant to express allowance by the laws of the United States, namely, 72 Stat. 339, Section 4, the regulations of the Secretary of the Interior, 24 CFR 2053-2059, the Reservation Act, 48 USC 358, and presidential Proclamation No. 1332. Appellant's rights under the laws of the United States were thus made an essential element of its cause of action and brought the case within 28 USC 1257 (1) and (2). *Gully v. First National Bank* (1936) 299 U.S. 109, 81 L.ed. 70, 57 S.Ct. 96. The opinion of the Court that the Federal laws upon which appellant relied violated the "equal footing" doctrine, and for that reason were of no force and effect against conflicting Alaska law, also brings the case within the jurisdictional provisions of Title 28. *Mallinckrodt Chemical Works v. Missouri,* 238 U.S. 41, 59 L.ed. 1192; *New York, ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 73 L.ed. 184.

It is submitted that the decision of the District Court

of the State of Alaska fails to recognize the supremacy of congressional enactments in this regard over conflicting State law. In so doing, it authorizes the State of Alaska to interfere with the exercise of Indian fishing in violation of the laws of the United States. We believe that the questions presented by this appeal are substantial and that they are of public importance. Finally, we cannot believe, as the lower Court inferentially held, that the Statehood Act, solely by virtue of its passage, obliterated a substantial portion of an Indian reservation and not only divested the United States of title thereto (held by the United States as trustee since 1891) but also vested title thereto in and to the State of Alaska.

Respectfully submitted,

EDWARD G. DOBRIN
A. H. ZIEGLER
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Attorneys for Appellant.

APPENDIX 1

OPINION OF THE DISTRICT COURT FOR THE STATE OF ALASKA

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

ORGANIZED VILLAGE OF KAKE, *Plaintiff*, vs. WILLIAM A. EGAN, Governor of the State of Alaska, *Defendant.*	Civil Action No. 8063-A
ANGOON COMMUNITY ASSOCIATION, *Plaintiff*, vs. WILLIAM A. EGAN, Governor of the State of Alaska, *Defendant.*	Civil Action No. 8064-A

and

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE, a federally chartered corporation, *Plaintiff*, vs. WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Defendants.*	Civil Action No. 8066-A

OPINION

Filed July 1, 1959

R. L. JERNBERG, of Gore & Jernberg, Ketchikan, and C. L. CLOUDY, of Ziegler, Ziegler & Cloudy, Ketchikan, for plaintiffs Organized Village of Kake and Angoon Community Association.

ROBERT H. ZIEGLER, SR., and A. H. ZIEGLER, of Ziegler, Ziegler & Cloudy, Ketchikan, for plaintiff Metlakatla Indian Community, Annette Islands Reserve.

JOHN L. RADER, Attorney General of Alaska, JAMES M. FITZGERALD, Special Assistant Attorney General, and DOUGLAS L. GREGG, Assistant Attorney General, for defendants.

KELLY, Judge.

The first two captioned cases were consolidated for trial, and the third was heard the following day. Because of the similarity of the actions, the three cases are consolidated for the purpose of this opinion.

The urgency of this matter makes immediate determination imperative. It would, of course, be desirable if my decision could be based on a written opinion as complete as the able briefs of counsel for both parties filed herein, but time does not permit the preparation of a formal opinion, so it must suffice that I announce my decision from the bench and do as well as possible from notes and excerpts from decisions.

I need hardly state that I agree with counsel on both sides in their expressed regard for the importance of this action now before us for decision.

We have here a conflict between the authority of the Secretary of the Interior, an officer of the United States, and the Governor of Alaska. In this it is not a conflict of these officials as individuals or personalities, but of what they represent in this controversy.

We have in effect the state opposed to the United States.

We have the majesty of the nation on one hand and the sovereignty of the state on the other; in between, three Indian communities whose plight in the dwindling fish economy of Alaska is a matter of grave concern.

Where the exercise of claimed state power and authority collides with the exercise of claimed federal power and authority, the difficult and tender problem of resolving, under existing law and judicial decisions, the questions thus arising, with due regard to the dignity of the one and the sovereignty of the other, becomes the delicate task of the Court.

Able and convincing arguments have been capably presented by counsel for both sides.

The facts are substantially agreed upon and are fully set forth in the pleadings, briefs and recorded statements of counsel.

After reading the pleadings and briefs, hearing the arguments, examining the exhibits and affidavits, and studying numerous authorities, I have concluded that the relief sought in these three cases must be denied and the bills of complaint therein dismissed.

I will try and state my reasons for this decision.

This Court can take judicial notice of the following facts and conditions and matters of general knowledge:

(1) There has long been growing opposition to fish traps in Alaska, and plebiscites held in the Territory in connection therewith have resulted overwhelmingly in votes for the abolishment of traps.

(2) The three Indian villages here concerned as plaintiffs in these actions had voted overwhelmingly for the abolishment of traps.

(3) The salmon runs in Alaska are being rapidly depleted.

(4) The use of fish traps takes great numbers of fish from Alaskan waters for the benefit of the few who own or control the traps.

(5) Even with trap operations, many canneries have been compelled to close in Alaska in recent years, because of lack of an adequate fish supply.

(6) Traps were reduced over the years in number and curtailed in operation, and finally abolished by the state, the well-known purpose of which was to conserve the salmon supply for the benefit of all of the people of the state as a whole.

(7) Financial loss occurred to some who owned or controlled the traps each time they were cut in number or limited in operation.

I find the following statements of the law determinative of the issues in this case. The state owns the tidelands and controls all areas wherein traps were threatened to be installed. In other words, the proposed trap sites are located in inland waters over which the State of Alaska has dominion.

Mr. Justice Reed, in *Alabama v. Texas et al.*, 347 U.S. 272 at page 275, stated:

"If the marginal lands were thus declared by the *California* and following cases to belong to the United States, they were ceded to the states through the subsequent Submerged Land Act of 1953 by the clause: 'Title to and ownership of the

> lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters . . . are hereby . . . recognized, confirmed, established, and vested in and assigned to the respective States . . ." Sec. 3(a). If, on the other hand, the marginal lands were not declared by those cases to belong to the United States, title to them remained in the respective states. Either by original ownership or by the cession of the Act, the lands are now the property of the respective states . . .

The new State of Alaska is entitled to such powers as have been given to all states by the Submerged Lands Act.

Indian fishing rights do not include the right to fish with forbidden gear or in a manner prohibited to other citizens of the state.

No property right exists in fish traps and their use has been legally prohibited in the state.

The "equal footing" clause has long been held to refer to political rights and to sovereignty and to have a direct effect on certain property rights, and the question arose early in controversies between the states and the federal government as to ownership of the shores of navigable waters, and it was held that to deny to the states, admitted subsequent to the formation of the union, ownership of this property, would deny them admission on an equal footing with the original states. *Pollard's Lessee v. Hagan,* 44 U.S. 212, 228-229 and cases cited.

Upon the admission of a state to the Union the title

of the United States to lands underlying navigable waters within the state passes to it as incident to the transfer to the state of local sovereignty and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. *United States v. Oregon,* 295 U.S. 1, 14.

The lands on which the fish traps are to be moored are tidelands or lands underlying inland waters, and subject to the authority of the state to regulate fishing.

Of course the United States has responsibility under laws passed by Congress toward the Indians. The United States has made treaties—solemn pacts with Indian nations. Indians have been accorded rights by the United States in Territories and in lands controlled by the United States, but many of these rights disappear when a new state is formed. *Ward v. Race Horse,* 163 U.S. 504. In this case, on page 514, Mr. Justice White stated as follows:

> " * * * It may be further, for the sake of the argument, conceded that where there are rights created by Congress, during the existence of a Territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration.* * * "

See also *Kennedy v. Becker,* 241 U.S. 556; *U.S. v. Winans,* 198 U.S. 371 (384). An Indian reservation created by executive order of the President conveys no right of use or occupancy beyond the pleasure of Congress and the President.

When an Indian reservation is established by treaty the right of use or occupancy depends upon the language or the purpose expressed therein.

Congress has power to make a reservation inclusive of the adjacent waters and submerged lands as well as uplands * * *. The reservation thus created is not a private grant but simply a setting apart until otherwise provided by law.

Statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. (See *Alaska-Pacific Fisheries v. United States,* 248 U.S. 78, pages 87 and 89.)

The reservation of the Metlakatla Indians was created at the will of Congress and did not constitute final disposal of the lands underlying the navigable waters. The extension of the 3,000 feet to include exclusive fishing rights by the President likewise did not constitute final disposal but only a grant until otherwise provided by law. The federal government retained jurisdiction thereof until Alaska became a state but upon achieving statehood, dominion and sovereignty thereof passed to the new state, subject only to the authority of the federal government in regulating navigation and commerce. *Pollard's Lessee v. Hagan,* 44 U.S. 212. The

presidential order which extended the exclusive fishing rights 3,000 feet offshore simply prohibited others from fishing therein and cannot be construed to permit the use of traps therein when prohibited by state law.

Under territorial status the Annette Island natives could not claim any vested property right in any particular method or means for taking fish. Their authority to operate a fishery at all came from the Secretary of the Interior under the provisions of the White Act.

The state regulates and controls wildlife resources and fisheries in the marginal sea. This was originally based on a concept of ownership. (*McCready v. Virginia,* 94 U.S. 391). This theory has to some extent been repudiated and the modern concept contemplates that state control is founded upon the power to regulate in the state the protection of these resources for all the people.

The state has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of the people.

Geer v. Connecticut, 161 U.S. 519. See also
Skiriotes v. Florida, 313 U.S. 69;
Toomer v. Witsell, 334 U.S. 385;
Corsa v. Tawes, 149 Fed. Supp. 771.

The right to control fisheries rests in the state in the absence of affirmative action of Congress. *Manchester v. Mass.,* 139 U.S. 240.

Fish and game are owned by the states, not as proprietors, but in their sovereign capacity as the repre-

sentatives and for the benefit of all their people in common. *U.S. v. Shawver,* 214 Fed. 154.

The White Act, 48 USC Sec. 221, was passed by Congress to protect and conserve fisheries in Alaska. It was amended by Sec. 6 (e) of the Alaska Statehood Act, which contained the so-called Westland proviso. The constitution of the State of Alaska became effective simultaneously with the Statehood Act, and with it Ordinance Number Three, which for reasons therein stated, abolished the use of fish traps for the taking of salmon for commercial purposes in all the coastal waters of the State.

If the White Act is amended by Sec. 6 (e) and by Ordinance Number Three as interpreted by the Secretary of the Interior (*Ketchikan Packing Co. v. Seaton,* opinion filed May 14, 1959, United States Court of Appeals for the District of Columbia) then the White Act must prohibit the use of traps in Alaskan waters.

The *Ketchikan Packing* case holds that Congress intended the Secretary to be a trustee for both the federal government and the new state during the transition of administration from the federal to the state authorities in the broad national interest. It further held that the Secretary, in that unique capacity, could not reasonably disregard a valid law of Alaska existing on January 3, 1959, the effective date of the Alaska Statehood Act and the Alaska constitution, and Ordinance Number Three.

The authority conferred upon the Secretary by existing law, as above set forth, should not be permitted

to impair the powers or rights of the new state which come from the status of statehood. To do otherwise would seem to impair the equal footing standing of the new state.

The White Act is still in effect and is the Act from which the Secretary of the Interior derived his authority, and this Act specifically states that every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies and that no exclusive or several right of fishery shall be granted therein. Therefore the White Act forbids exclusive right of fishery. This was the holding in the case of *Hynes v. Grimes Packing Co.*, 337 U.S. 86, at page 122:

> As Sec. 208.23 (r) with its exception in favor of the natives in possession of Karluk Reservation and their licensees is based upon Sec. 1 of the White Act, we think it clear that its proviso that no exclusive or several right of fishery shall be granted therein applies to commercial fishing by natives equally with fishing companies, nonresidents of Alaska or other American citizens and so applies whether those natives are or are not residents on a reservation. We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights * * * The White Act fishing preserves were not intended to furnish a monopoly to a favored few.* * *

There are many cases besides those which I have mentioned which have been cited by counsel in their briefs and arguments which support the conclusions

here reached, that the Secretary of the Interior is without authority to except the fish traps of the plaintiffs from his Order dated March 7, 1959, 24 Fed. Reg. 2053-71, prohibiting the use of fish traps in Alaskan waters effective April 18, 1959; and that the State of Alaska has authority to prohibit all fish traps in Alaskan waters, including those of the plaintiffs, and the plaintiffs are not entitled to the relief here sought.

Findings of fact, if desired, may be presented, together with Judgment and Decree in accordance with this opinion.

RAYMOND J. KELLY
U.S. District Judge

Supplemental Finding of Fact No. 1

The waters of the Alexander Archipelago, State of Alaska, which lie to the landward of a line drawn from Cape Spencer lighthouse at the entrance of Cross Sound, and following generally the sinuosities of the coast, that is, the meander line of mean low water, and bridging headlands and bays as the line is drawn in a general southeasterly direction past Cape Bartholomew, Cape Muzon, and eastward through Cape Chacon and ending at a line drawn from the northernmost extremity of Pt. Mansfield, Sitklan Island, 040° true, to where it intersects the mainland, as more particularly described in 33 C.F.R. 82, 275, are all inland waters and historic bodies of water. Because of historic, social and geographic considerations, of which this court takes judicial notice, and based also on a consideration of the record in this case, I find:

That geographically and geologically the Alexander Archipelago is part of a long mountain range which extends from the southern tip of the so-called Panhandle of Alaska's general land mass in a northwesterly direction, and includes the St. Elias Mountains, the Wrangell Mountains, and the Talkeetna Mountains in Southcentral Alaska.

That the main mass of igneous rocks which intruded the older sediments forms the core of this general land mass. The resulting topography, formed by erosion of the complex fault patterns and contacts between different rock types, and a later partial inundation, is a series of long, narrow arms of the sea, which have encroached upon the general land mass without actually altering its original coastline facing the open sea.

That the general land mass of the Alexander Archipelago retains its mountain-range character with elevations ranging from 2,000 to 6,000 feet, and that the present arms of the sea were at one time river valleys which have been eroded by glacial action, creating the long, narrow fjords which exist today as inland waterways, the only substantial means of surface transportation throughout the Archipelago.

That the historical economy of the area involved is primarily oriented to a marine way of life in which the 10—The Argus Press for Briefs 3211 FN 8-13—95507 inland waters furnish the primary, and in many areas, the only industry. Said waters are in every respect a necessary and intimate part and parcel of the territory of the State of Alaska.

Supplemental Finding of Fact No. 2

Although plaintiff may suffer some loss if the right to fish by means of fish traps is denied, still I find that the damages alleged are to a large extent speculative in nature because of (1) the limited predictability of the salmon runs, (2) the existence of an independent fleet of seine boats with whom plaintiffs are free to bid for their catch on the basis of the price offered therefor, and (3) the possibility of increased catches by plaintiffs' own seine boats resulting from the abolition of fish traps.

Supplemental Finding of Fact No. 3

The Court judicially notices that fish traps, whether of the floating or pile-driven variety, are customarily affixed to the shoreline with the remainder necessarily extending out over tidelands and beyond into the navigable waters below the meander line of mean low tide.

APPENDIX 2

JUDGMENT OF THE DISTRICT COURT FOR THE STATE OF ALASKA

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

ORDER FOR DISMISSAL

In the matter of the METLAKATLA INDIAN COMMUNITY, *Plaintiff,* vs. WILLIAM A. EGAN, *Defendant.*	No. 8066-A

THIS MATTER having come on before the Court for final hearing on plaintiff's complaint for a permanent injunction on the 29th day of June, 1959; plaintiff appearing through its counsel, Robert H. Ziegler, and defendant appearing through its counsel, the Attorney General for the State of Alaska, and the Court having heard oral argument and having rendered its opinion, which opinion with supplemental findings of fact is in lieu of findings of fact and conclusions of law,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiff be and it hereby is dismissed with prejudice.

WITNESS my hand and seal of this honorable Court this 2nd day of July, 1959.

/s/ RAYMOND J. KELLY
District Judge

APPENDIX 3

STATUTES INVOLVED

43 Stat. 464, 48 USC 221 (1924)

Fishing areas, closed season, limitation on fishing.

For the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of the Interior from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein, (b) limit the catch of fish to be taken from an area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable.

43 Stat. 464, 48 USC 222 (1924)

Unlawful fishing in areas no exclusive rights to be granted citizens.

From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish, and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided,* That every such regulation made by the Secretary of the Interior shall

be of general application within the particular area to which it applies and that no exclusive or several right of fishery shall be granted therein nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior.

72 Stat. 339 (1958) Alaska Statehood Act

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled. That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 8 (c) of this Act, the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska entitled, "An Act to provide for the holding of a constitutional convention to prepare a constitution for the State of Alaska, to submit the constitution to the people for adoption or rejection, to prepare for the admission of Alaska as a State, to make an appropriation, and setting an effective date, approved March 19, 1955 (Chapter 46, Session Laws of Alaska 1955), and adopted by a vote of the people of Alaska in the election held on April 24, 1956, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

Sec. 2. The State of Alaska shall consist of all territory together with the territorial waters appurtenant thereto, now included in the Territory of Alaska.

* * * *

Sec. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives); or is held by the United States in trust for said natives that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation . . .

Sec. 6 (e). All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478, 48 U.S.C. secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C. secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: Provided, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws

until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest . . .

Sec. 6 (m). The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session, 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

Sec. 8 (b). At an election designated by proclamation of the Governor of Alaska, which may be the general election held pursuant to subsection (a) of this section, or a Territorial general election, or a special election, there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, by separate ballot on each, the following propositions:

"(1) Shall Alaska immediately be admitted into the Union as a State?

"(2) The boundaries of the State of Alaska shall be prescribed in the Act of Congress approved (date of approval of this Act) and all claims of this state to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States.

"(3) All provisions of the Act of Congress approved (date of approval of this Act) reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people."

In the event each of the foregonig propositions is adopted at said election by a majority of the legal votes

cast on said submission, the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly. In the event any one of the foregoing propositions is not adopted at said election by a majority of the legal votes cast on said submission the provisions of this Act shall thereupon cease to be effective.

Sec. 30. All Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the legislature of said Territory or by Congress, are hereby repealed.

67 Stat. 29, 43 USC 1301 (1953)

Sec. 2. When used in this Act—(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which for-

merly were lands beneath navigable waters, as hereinabove defined.

* * * *

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp and other marine animal and plant life but does not include water power, or the use of water for the production of power.

* * * *

67 Stat. 30, 43 USC 1311

Sec. 3. Rights of the States—

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law, be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof.

67 Stat. 29, 43 USC 1313 (a), (b):

Exceptions from confirmation and establishment of States' title, power and rights.

There is excepted from the operation of Section 1311 of this title—

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use, and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians.

Constitution of the State of Alaska, Article XII, Section 12

The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise

provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, unless otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.

48 USC 358:

"Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakatla Indians, and those people known as Metlakatlans who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

Title 43, USC 141:

"The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry of any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

Order of the Secretary of the Interior bearing date of February 11, 1915:

"Department of the Interior,
Bureau of Education,

Washington. February 9, 1915.

Dear Mr. Secretary: Under the provisions of the act of March 3, 1891, setting apart Annette Islands, Alaska, for use in common by the Metlakahtlans, under such rules, regulations and restrictions as may be prescribed from time to time by the Secretary of the Interior, I respectfully recommend: (1) That, until otherwise ordered by the Secretary of the Interior, natives or associations of natives of Metlakahtla who have secured the approval of the council of the Annette Islands reserve be given permits by the Secretary of the Interior to erect salmon traps on the shores of Annette Island, on condition that they pay to the Secretary of the Annette Islands reserve, at the close of each fishing season, a yearly tax of $25 for each trap; (2) that permits be given by the Secretary of the Interior to natives of Metlakahtla to cut timber on the Annette Islands reserve for lumber and piling on condition that they pay to the secretary of the Annette Islands reserve $1.00 per thousand board feet for all logs sold away from the reserve and fifty cents (50c) per thousand board feet for all logs to be used for lumber or piling on the reserve; and (3) that 10 per cent of all money paid to the secretary of the Annette Islands reserve for timber and salmon traps shall be used for medical and school work on the reserve under the direction of the commissioner of education. The balance of all funds paid to the secretary of the Annette Islands reserve as fees on timber and salmon traps shall

revert to the general fund of the reserve for such uses as the council may direct.

The above recommendations are based upon the inclosed letters from Mr. C. D. Jones, teacher of the United States public school at Metlakahtla, and Mr. W. T. Lopp, chief of the Alaska division of the Bureau of Education, also upon information furnished me by Mr. Lopp.

Cordially yours, (Signed) P. P. Claxton, Commissioner. The Honorable the Secretary of the Interior. Approved Feb. 11, 1915. (Signed) Franklin K. Lane, Secretary."

Presidential Proclamation No. 1332, April 28, 1916:

Presidential Proclamation No. 1332, bearing date of April 28, 1916:

"Annette Island Fishery Reserve, Alaska. By the President of the United States of America:

A Proclamation,

No. 1332

Whereas, it is provided by section fifteen of the Act of Congress approved March third, eighteen hundred and ninety-one, entitled, "An act to repeal timber culture laws, and for other purposes," that "until otherwise provided by law, the body of lands, * * * in Southeastern Alaska, on the north side of Dixon's Entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may (be)

prescribed from time to time by the Secretary of the Interior"; and

Whereas, the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and

Whereas, it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery:

Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on those islands, to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this 28th day of

April, in the year of our Lord one thousand nine hundred and sixteen, and of the independence of the United States the one hundred and fortieth.

Woodrow Wilson.
By the President:

Robert Lansing, Secretary of State."

24 FR 2053, 2056, Section 102.10:

Types of gear permitted, salmon fishing. In fishing for salmon all forms of gear other than drift gill nets, set nets, purse seines, beach seines, fish wheels, trolling apparatus, hand lines, rods, spears, and gaffs are prohibited at all times. Traps are prohibited, except native Indian-owned traps specifically authorized in Part 115.

Section 115.26:

Sites open to native Indian traps:

Salmon traps owned and operated by native Indian communities may be operated in 1959 at the following sites:

(a) *Annette Island Fishery Reserve*

(1) Annette No. 3, located at 55°02′47″ N. lat., 131° 38′53″ W. long.

(2) Annette No. 4, located at 55°05′47″ N. lat., 131° 36′39″ W. long.

(3) Annette No. 6, located at 55°00′45″ N. lat., 131° 38′30″ W. long.

(4) Annette No. 8, located at 55°10′13″ N. lat., 131° 19′31″ W. long.

(b) *Organized Village of Kake*

(1) Kake-Cape Fanshaw, located at 57°10′52″ N. lat., 133°32′44″ W. long.

(2) Kake-Point Pybus, located at 57°18′40″ N. lat., 133°57′21″ W. long.

(3) Kake-Point Mccartney, located at 57°01′23″ N. lat., 134°02′50″ W. long.

(4) Kake-Cornwallis, located at 56°55′52″ N. lat., 134°16′08″ W. long.

(c) *Angoon Community Association*

(1) Angoon-Basket Bay, located at 57°36′16″ N. lat., 134°51′34″ W. long.

(2) Angoon-Eagle Island, located at 57°22′28″ N. lat., 134°34′18″ W. long.

(3) Angoon-Point Caution, located at 57°13′52″ N. lat., 134°39′05″ W. long.

1959 Session Laws of Alaska, Chapter 17

Section 1. It shall be unlawful to erect, moor or maintain fish traps, including but not limited to floating, pile driven or hand driven fish traps, on or over any lands or tidelands owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska.

* * * *

Section 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed six months or by fine not to exceed $1,000 or by both such fine and imprisonment.

1959 Session Laws of Alaska, Chapter 95

Section 1. It shall be unlawful to operate fish traps,

including but not limited to floating, pile-driven or hand-driven fish traps in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters provided nothing in this section shall prevent the operation of small hand-driven fish traps of the type ordimarily used on rivers of Alaska which are otherwise legally operated in or above the mouth of any stream or river in Alaska; nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights) the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives.

Section 2. Section 1 of Chapter 17 SLA, 1959, is hereby amended to read as follows:

Section 1. It shall be unlawful to erect, moor or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or waters, owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska, which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska.

Sec. 3. Sec. 2 of Chapter 17, SLA 1959, is hereby repealed.

Sec. 4. Sec. 3 of Chapter 17, SLA 1959, is hereby amended to read as follows:

Sec. 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed

one year or by fine not to exceed $5,000.00 or by both such imprisonment and fine.

Sec. 5. A violation of this act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year or by a fine not to exceed $5,000.00, or by both such imprisonment and fine.

1957 Session Laws of Alaska, Chapter 170

Section 1. Any person or corporation having any claim against the Territory of Alaska shall have a right of civil action against the Territory in the District Court for the District of Alaska.

Section 7. *Exceptions.* The provisions of this Act shall not apply to:

(1) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a territorial agency or an employee of the Territory, whether or not the discretion involved be abused.

48 Stat. 985, 25 USC 465 (1934)

The Secretary of the Interior is hereby authorized in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

* * * *

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

73 Stat. 141 (1959)

Sec. 2 (a). Section 4 of the Act of July 7, 1958 (72 Stat. 339) providing for the admission of the State of Alaska into the Union, is amended by striking out the words "all such lands or other property, belonging to the United States or which may belong to said natives" and inserting in lieu thereof the words "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for natives.

(b) Section 6 (e) of said Act is amended by striking cut the word legislative and inserting in lieu thereof the word "calendar."

72 Stat. 545, 18 USC 1162:

State jurisdiction over offenses committed by or against Indians in the Indian country.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian Country Affected*
Alaska	All Indian country within the Territory
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

62 Stat. 757, 18 USC 1151:

Indian country defined.

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issu-

ance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within on without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, *Appellant*,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee*.

No. 286 [illegible] 2

ORGANIZED VILLAGE OF KAKE, *Appellant*,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee*.

ANGOON COMMUNITY ASSOCIATION, *Appellant*,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee*.

No. 287 [illegible] 3

On Appeal from the District Court for the State of Alaska

MOTION TO AFFIRM OR DISMISS
and
BRIEF OF APPELLEE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, *Appellant*, v. WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee*.	No. 326
ORGANIZED VILLAGE OF KAKE, *Appellant*, v. WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee*.	No. 327
ANGOON COMMUNITY ASSOCIATION, *Appellant*, v. WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee*.	

On Appeal from the District Court for the State of Alaska

MOTION TO AFFIRM OR DISMISS

Appellee [pursuant to Supreme Court Rule 16 1(c)] moves the Court to affirm the judgment sought to be reviewed on appeal, on the ground that if any questions remain which are not moot, the same are so unsubstantial as not to need further argument. (The

question whether the district court in Alaska is a federal court within the meaning of Rule 16 1(c) has not been subjected to judicial determination.)

Appellee moves the Court, pursuant to Rule 16 1(b), in the alternative, to dismiss the appeal herein on the ground that it does not present a substantial federal question.

Dated at Juneau, Alaska, this 16th day of September, 1959.

Respectfully submitted,

JOHN L. RADER
Attorney General of Alaska

JAMES M. FITZGERALD
Special Counsel

DOUGLAS L. GREGG
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, *Appellant*,

v.

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ANGOON COMMUNITY ASSOCIATION, *Appellant*,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee*.

No. 327

On Appeal from the District Court for the State of Alaska

BRIEF OF APPELLEE

ORGANIZATION OF BRIEF AND QUESTIONS PRESENTED BY APPELLANTS

The appellants Kake and Angoon raise four questions in their printed brief. The appellant Metlakatla raises seven, the first four of which are identical to those raised by Kake and Angoon. (Kake-Angoon

brief, 4 and 5; Metlakatla brief, 4 and 5.) The four questions common to both printed briefs which are identically presented, even to numbering, paraphrased are:

1. Does § 6(e) of the Alaska Statehood Act, 72 Stat. 339, containing what is commonly known as the Westland proviso, reserve for the calendar year 1959 complete control of Alaska fisheries in the Secretary of the Interior notwithstanding Alaskan constitutional provisions and state statutory criminal law to the contrary?

2. If the Secretary of the Interior does have exclusive control, is § 6(e) of the Statehood Act (Westland proviso) in violation of the "equal footing" doctrine governing the admission of new states?

3. (a) Do § 4 of the Statehood Act and Art. XII, § 12, of the Alaska Constitution comprehend a permanent disclaimer by the State over any control whatsoever of Indians fishing in state waters, and

(b) Do these sections affirmatively grant authority to the Secretary of the Interior to exclude appellants from the operation of state constitutional provisions (Ordinance 3) and general criminal statutes relating to fish traps?

4. If the disclaimer (in Question 3) is interpreted as valid authority for the Secretary of the Interior to authorize fish traps in violation of the State Constitution (Ordinance 3), does the same violate the "equal footing" doctrine governing the admission of states?

Metlakatla, in its brief, presents three additional questions, which are:

5. Did the Statehood Act, by its conveyance of tidelands and submerged lands to the State, destroy or restrict the exclusive right of fishery purportedly established by a presidential proclamation for the Metlakatla Indians?

6. Does the Secretary of the Interior have the authority under the White Act (48 U.S.C., § 221) to grant a discriminatory fishing privilege to Indians, or, in the alternative, does he have such authority pursuant to the Act of Congress creating the Annette Island Metlakatla Reserve (48 U.S.C., § 358) and the subsequent presidential proclamation?

7. Did the lower court err in holding that waters surrounding the Metlakatla reservation are not "Indian country" and therefore subject to all state criminal laws?

STATEMENT OF THE CASE

None of the appellants claim aboriginal, historical, or treaty rights. The Metlakatlans immigrated from Canada in the year 1887 and have used traps intermittently since 1915 (Metlakatla, 7). Kake and Angoon got into the fish-trap business in 1948 when they purchased a cannery from private interests. The fish traps used by all of the appellants have been used only at such times as the same have been authorized by the Secretary of the Interior under *general fishing regulations* applicable to the whole of Alaska, promulgated pursuant to the authority of the White Act and similar fisheries legislation "for the purpose of protecting and conserving the fisheries." [§ 1, 43 Stat. 464; 48 U.S.C., §§ 221-224 (White Act).] Pursuant to § 1 of the White Act (48 U.S.C., § 222), Indians composing the appellant communities, whites and half-bloods competing for a limited number of fish have been consist-

ently treated with equality, with no special privilege being given to appellants as communities or to their inhabitants as individuals. Historically, all have been treated equal—natives and whites. The first discrimination occurred in 1959 and is the source of this litigation. It is important to understand that as a factual matter this litigation does not involve fishing by individual Indians for personal use and consumption, but rather, the rights here involved are those connected with million-dollar commercial enterprises.

Ordinance 3 of the Constitution of the State of Alaska provides:

> "As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State."

This is existing law binding on the Secretary of the Interior, *Ketchikan Packing Company, et al.* v. *Fred A. Seaton, Secretary of the Interior, et al.,* (May 14, 1959) 267 F. 2d 660.

SUMMARY OF ARGUMENT

The real issues of this litigation are moot.

The chain of authority for the claim of appellants in its present posture is as follows:

1. Regulations issued by the Secretary of the Interior permitted them to fish certain fish traps for the year 1959.

2. The direct authority for the regulations was the White Act.

3. The White Act was made applicable to Alaska after statehood by the Westland proviso.

4. Pursuant to the terms of the Westland proviso, it will expire January 1, 1960.

5. The 1959 fishing season has terminated and, therefore, all issues of interpretation, constitutionality, and rights concerning the Westland proviso, the White Act, and the regulations of the Secretary pursuant to the same are moot.

Section 4 of the Statehood Act is not the basis for a present claim to a federal right by appellants, but may possibly be the basis for a future claim. The same is true of the special statute pertaining to Metlakatla, creating their reservation, and the presidential proclamation pertaining to surrounding waters. At this time, a pronouncement as to § 4 and the special Metlakatlan statute and proclamation is unnecessary and speculative inasmuch as the rights claimed by appellants in this case had as their source the White Act and the Westland proviso, which are moot.

The injunctive relief sought by appellants is no longer necessary for the 1959 season, as the appellants did, in fact, fish their traps, and no parties involved in the litigation can claim damages against the other.

The basic problems, constitutional and otherwise, concerning fish traps and state/federal relationships, are of great importance and, therefore, should not be decided on moot or speculative issues. All issues, both moot and speculative, involves serious state and federal constitutional problems which should be avoided until squarely presented to this Court in a justiciable controversy.

ARGUMENT

I.

SECTION 6(e) OF THE ALASKA STATEHOOD ACT (WESTLAND PROVISO) AND THE WHITE ACT ARE THE AUTHORITY USED BY THE SECRETARY OF THE INTERIOR IN PROMULGATING THE REGULATIONS UNDER WHICH APPELLANTS OPERATED THEIR FISH TRAPS. ALL QUESTIONS PERTAINING TO THIS PROVISO ARE NOW MOOT. THE REGULATIONS APPLY ONLY TO THE CALENDAR YEAR 1959; THE PROVISO WILL HAVE NO EFFECT BEYOND JANUARY 1, 1960; AND THE FISHING SEASON IS OVER FOR 1959.

For many years the fisheries of Alaska have been administered by the Secretary of the Interior pursuant to the authority granted by what is popularly known as the White Act (48 U.S.C., § 220, et seq.). The Territory never had a grant of authority from Congress to manage and administer its own fisheries. In furtherance of the purposes of the White Act of "protecting and conserving" (48 U.S.C., § 221), the Secretary of the Interior has from time to time issued regulations closing certain areas to fishing, prohibiting fishing during certain periods, and limiting the size, amount and nature of gear to be used in the taking of fish, etc. The White Act expressly prohibits any exclusive right of fishery or any discrimination as among citizens engaging in the fishery. (See 48 U.S.C., § 222.) The Secretary can discriminate as between different types of gear to be used, traps versus set nets versus seines, etc. (See *Dow* v. *Ickes,* 123 F. 2d 909.) However, the fishery was to be available to all, and no provision was to be made for discrimination among persons. (See *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86, 93 L. ed. 1231, 69 S. Ct. 968 (1949).) The appellants historically have not been subject to treatment under the regulations of the Secretary of the Interior different from the treatment accorded other fishermen or fishing communities in Alaska.

During the congressional debate on the Alaska Statehood Bill, considerable concern was expressed as to the ability of Alaska to police and manage its fisheries, primarily because it had historically never been permitted to engage in this activity and, therefore, was relatively unprepared in legislation, equipment, and personnel. As a result, when the Statehood Bill was finally enacted, § 6(e) of 72 Stat. 339 provided for the transfer to Alaska of properties and equipment heretofore used by the Federal Government in the regulation of fisheries. The "Westland proviso" was added to § 6(e), stating that the "administration and management" of Alaska's fisheries shall be retained by the Federal Government under existing laws until after the Secretary of the Interior has certified that the Alaska Legislature has made adequate provision for the administration, management, and conservation of said fisheries "in the broad national interest." As observed by appellants, "The time limit therein expressed has been since defined, and federal control will cease January 1, 1960." (Kake-Angoon, 11; Metlakatla, 13.) The Westland proviso (if constitutional—a point which need not be passed upon, since it is moot) continued in the Secretary of the Interior the authority for the year 1959 that he previously had under the White Act.

Pursuant to the White Act, the Secretary issued his 1959 regulations on March 7, 1959, 24 C.F.R. 2053-2059 (Kake-Angoon, 11; Metlakatla, 13). These regulations (§ 115.26) authorized the appellants to fish with fish traps in certain locations. Pursuant to the Administrative Procedure Act (5 U.S.C., § 1001, et seq.), the authority for a regulation must be given. The Secretary cited the White Act, 48 U.S.C., § 221, and stated

that the reason the White Act applied after statehood, that is for the year 1959, was because of the authority expressed in § 6(e) of the Statehood Act. (Federal Register, Thursday, March 19, 1959, 24 F.R. 2053.) As will be obvious by a casual examination of the regulations of the Secretary for the calendar year 1959, and as practical matter, the fishing season in Alaska for the calendar year 1959 has terminated.

For the same reason that § 6(e) is moot, an interpretation of the White Act, and of the regulations issued for 1959 pursuant to the same, would be unnecessary and would entail useless effort. However, even if the Westland proviso, § 6(e), were not moot, and even if the question of the proper interpretation of the White Act were not moot, the regulations upon which appellants claim a federal right and which are issued for a calendar year only, that is 1959, are moot.

Appellants do not dispute that the regulations promulgated by the Secretary of the Interior which are in question here are merely for the calendar year. This was conceded in the oral argument before Justice Brennan. It is obvious that fishing regulations, the purpose of which is to conserve and protect the fishery, must be altered from year to year as the cycles of salmon runs change. The appellants have observed that the Secretary has always in the past "issued regulations from year to year." (Kake-Angoon, 11; Metlakatla, 13.) As the Secretary observed in 24 F.R. 2053,

> ". . . it has been determined that only eleven of the twenty-one Indian traps can be permitted to operate *during the 1959 season.*" (Emphasis added)

The appellants have fished their traps, rightly or wrongly, for 1959, and we do not believe they are subject to a damage action. Nor, as appellants have observed, is the State subject to a damage action for any delay occasioned by state action in the use of fish traps during the immediate past season. (Kake-Angoon, 7; Metlakatla, 8.)

It is submitted that the foregoing argument shows conclusively that Questions 1 and 2, common to the appellants' briefs, are thoroughly mooted and do not remain substantial federal questions requiring the action of this Court.

II.

SECTION 4 OF THE STATEHOOD ACT NEITHER CREATES NOR DESTROYS ANY FISHING RIGHTS. DOES NOT CONTINUE IN EXISTENCE THE OPERATION OF THE WHITE ACT NOR THE AUTHORITY TO ISSUE REGULATIONS PURSUANT TO THE WHITE ACT, AND ANY RIGHT WHICH THE APPELLANTS MAY HAVE PREDICATED ON THE SAME IS AT THIS TIME SPECULATIVE.

Appellants, in their brief, have failed to distinguish § 6(e) of the Statehood Act, Westland proviso, as a basis for a federal right, from § 4 of the Statehood Act, the negative disclaimer, and have urged both sections indiscriminately as authority for the issuance of regulations by the Secretary of the Interior under which they claim a federal right.

Upon close analysis, as shown in our Argument I, the complete authority, as interpreted by the Secretary of the Interior, for his regulations is § 6(e) of the Statehood Act and the White Act. Section 4 of the Statehood Act, as the legislative history clearly shows, does not purport to either create or extinguish Indian rights, but rather to leave the questionable nature of

the same to judicial or legislative determination. Congress wisely determined that it would not, while occupied with the greater issue of statehood, attempt to determine the right or wrong or even the existence of native rights. The following is a portion of the prepared report on the Statehood Bill, H.R. 7999:

> "Finally the section provides that no attempt will be made to deal with the legal merits of the indigenous rights but to leave the matter in status quo for either future legislative action or judicial determination."
>
> H.R. Report No. 624, 85th Congress, First Session, page 19. (For further analysis on this history, see brief of appellee, lower court, pages 102 to 104 of the transcript prepared by the district court clerk.)

Appellants urge as an interpretative aid that:

> ". . . The fact that the appellants were exercising a fishing right through the use of *fish traps owned by the United States as trustee,*[1] at the time Section 4 was enacted does much to suggest the language of Section 4 was tailored to cover that very situation. The record is clear that the Secretary of the Interior interpreted this section of the Statehood Act to allow the appellants to continue fishing as they had in the past subject to his regulation."

---

[1] So far as we can determine, the great logs and hundreds of yards of wire net which make a fish trap are held under a trust instrument as a security transaction to assist the Secretary of the Interior in collecting in excess of a million dollars he has loaned to appellant corporations. The holding in trust of the implements of fishing (a boat or trap) does not place a "fishing right" or the fishery in trust, nor will the holding in trust of a War Department permit to obstruct navigation by a fish trap accomplish the trust appellants infer. See the affidavit of Samuel G. Johnson, page 46 of transcript prepared by the district court clerk.

> "This interpretation is entitled to great weight in determining what Congress intended by Section 4 if there is any ambiguity in that language. *Fawcus Machine Co.* v. *U.S.*, 282 U.S. 375." (Emphasis added)
>
> (Kake-Angoon, 12; Metlakatla, 14.)

We believe appellants are in error when they state that the Secretary of the Interior interprets § 4 as giving him regulatory authority in the field of commercial fisheries. As we have shown in our Argument I, the Secretary, as required by the Administrative Procedure Act, clearly claims his authority for his regulations as being the White Act and §6(e) of the Statehood Act, not § 4 of the Statehood Act. (See 24 F.R. 2053.) This Court should not unnecessarily speculate as to whether or not in the future any claim to a federal right can be made under § 4. That claim should be litigated only when and if it is ever squarely presented. This section is but a naked tree which may or may not bring forth the fruit which the appellants are so anxious to harvest at this time. As stated by Justice Cardozo in the case of *Gully* v. *First National Bank,* (1936) 299 U.S. 109, 81 L. ed. 70, 57 S. Ct. 96:

> "The most one can say is that a question of federal law is lurking in the background, just as further in the background there lurks a question of constitutional law, the question of state power in our federal form of government."
>
> (Case cited, Metlakatla, 3; Kake-Angoon, 3 and 14.)

Even appellants have not been able to unequivocally claim any right under § 4 of the Statehood Act. For example, appellants state:

> "... is § 4 of the Statehood Act an assumption of permanent jurisdiction (subject to further act of Congress) by the Federal Government over the location and manner of Indian fishing within the States, ..."
>
> (Kake-Angoon, 4; Metlakatla, 5.)

And again the appellants make the point:

> "... that control over the Indian fishery was reserved to the Federal Government *until further act of Congress* ..."
>
> (Kake-Angoon, 8; Metlakatla, 9.)

Appellants again observe:

> "... The decisions of this court in *Manchester* v. *Massachusetts,* 139 U.S. 240, 35 L. ed. 159, and *Skiriotes* v. *Florida,* 313 U.S. 69, in upholding State control of fish and wildlife with special emphasis on the absence of conflicting federal legislation in each instance likewise suggest that this is a field for federal control if Congress elects to enter it."
>
> (Kake-Angoon, 13 and 14; Metlakatla, 15 and 16.)

We cite the foregoing from the appellants' briefs, not because we interpret the cited cases as they do, but because even they recognize that before they have a substantial federal right pursuant to § 4, there must be additional legislation, legislation to which appellants have not directed this Court. Unless § 4 is interpreted as we contend, then, as Justice Brennan observed:

> "... questions would be raised as to its constitutionality under the 'equal footing' doctrine substantially the same as those raised in regard to § 6(e) of the Statehood Act."

(See opinion of Justice Brennan, July 11, 1959, on application for restraining order.)

Constitutional questions should not be resolved on speculative issues in one instance and moot issues in the other.

Article XII, § 12, of the Alaska State Constitution has wording very similar to that of § 4 of the Statehood Act. This has not been discussed at length, for the simple reason that the Constitution of the State is not claimed by appellants to be the basis for a substantial federal question.

We believe the above arguments completely answer Questions 3 and 4 propounded by all the appellants and therefore, together with Argument I, dispose of the Kake-Angoon case, leaving only the special issues unique to Metlakatla.

III.

ALTHOUGH THE APPELLANT METLAKATLA MAY HAVE SOME FUTURE RIGHTS ON WHICH TO PREDICATE A FEDERAL QUESTION PURSUANT TO THE STATUTE SETTING APART CERTAIN LANDS FOR THEM AND A PRESIDENTIAL PROCLAMATION GIVING THEM THE RIGHT TO EXCLUSIVELY FISH IN CERTAIN WATERS, THE FEDERAL RIGHT, IF ANY, INVOLVED IN THIS LITIGATION ARISES OUT OF REGULATIONS ISSUED PURSUANT TO THE WHITE ACT AND SECTION 6(e) OF THE STATEHOOD ACT AND THE ISSUES ARE THEREFORE MOOT.

As we have shown earlier in Argument I, the source of the authority of the Secretary of the Interior for 1959 fishing regulations is § 6(e) of the Statehood Act, making the White Act applicable to Alaska only for the year 1959. The fishing season has terminated for Metlakatla, and they did in fact fish their traps during the fishing season of 1959. Even if the authority contained in § 6(e) were not limited in duration, the 1959

regulation admittedly expire on December 31, 1959. The positive issues involved in this litigation are moot.

We can concede that it is possible, but improbable, that the Secretary of the Interior will attempt by regulation to set aside the Alaska constitutional provisions prohibiting fish traps and the criminal statutes implementing the same after the year 1959. It is improbable because, as we have shown, the authority under which he acted for 1959 will be extinguished January 1, 1960. The Secretary of the Interior has a right, pursuant to Title 48 U.S.C., § 358, to engage in the management and control of the uplands of the Metlakatla reservation. This, of course, does not involve fish traps or fishing rights. Presidential Proclamation No. 1332 of 1916, giving to the Metlakatlan Indians an exclusive right to fish certain waters surrounding their reservation (which proclamation, we believe, is probably destroyed by operation of law by the advent of statehood, but a point we need not decide at this time) provides that the waters are to:

> ". . . be used by them (Metlakatlans) under the *general fisheries laws* and regulations of the United States as administered by the Secretary of Commerce." (now Secretary of the Interior) (Emphasis added)

Therefore, even though the Metlakatlans may be the *only persons* permitted to fish in certain waters, we submit that the Secretary of the Interior will regulate the fishing of these waters by the Metlakatlans (should he enter the field after January 1, 1960) only under *general fisheries laws,* and will not create racial discrimination in the *type of fishing implements to be used.* If the Secretary of the Interior does determine that he has authority under the Metlakatla reserva-

tion statute and the presidential proclamation to specially and specifically permit only the Metlakatla Indians of Alaska to operate constitutionally prohibited fish traps upon the tidelands, submerged lands or inland waters of Alaska, then at that time there will truly be a justiciable controversy involving a federal right which will be substantial in nature and go to the very root of federal/state relationships.[2]

The presidential proclamation concerning these waters states:

> "Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned."

It is to be noted that the State of Alaska has not in this case violated this provision. We have not claimed that the areas of tidelands, submerged lands or inland waters purportedly set aside by the presidential proclamation are open to fishing by *all* persons. We have claimed only that the Metlakatlans in their exclusive right to fish a certain area have no right to violate the organic law of Alaska in the taking of migratory fish, most of which remain in the waters in question for only a few hours to several days. So far as this case is concerned, the Metlakatlans may fish that area exclusively, so long as it is done with lawful gear calculated to conserve a disastrously depleted resource. The

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[2] The problems incident to the presidential proclamation and the statutory reservation as related to fishing are discussed at length in the case of *Alaska Pacific Fisheries* v. *U. S.*, Court of Appeals, Ninth Circuit, 240 F. 274, and this Court, 248 U.S. 78. The proclamation may have been void, and the limits of the statutory reservation undefined. However, for purposes of this brief, we are taking both at face value. The questions are not before the Court if our theory as to the mooted issues is correct.

statement by Judge Kelly, that the Metlakatlans could not fish with unlawful gear, does not destroy their exclusive right to fish in the waters in question. Appellant Metlakatla agrees that the attack on their reservation in the opinion of Judge Kelly was "by inference." (Metlakatla, 6 and 10.) Substantial federal questions are not thusly created.

The appellant Metlakatla argues that the lower court decision inferentially cuts into their reservation by holding that the waters set aside by the presidential proclamation are not Indian country. Although we do not deem this controlling, it is to be noted that the statutory Metlakatla reservation itself has been held not to be Indian country, *U. S.* v. *Booth,* 161 F. Supp. 269. However, here, of course, we are not talking about the statutory Metlakatla reservation as such, but rather waters covering tidelands, submerged lands and inland waters of Alaska, which, by presidential proclamation, the Metlakatlans have the right to fish exclusively under "general" fishing law.

Although Judge Kelly's opinion is thoroughly correct insofar as it pertains to the waters surrounding the Metlakatla reservation, we do not believe that this case properly presents for this Court a substantial federal question (based on an inference at most) due to the fact that these aspects of the case are not essential to the decision, and those issues of the decision which are essential to the holding have been mooted, as above indicated.

CONCLUSION

The issues suggested in this case are important to Alaska and to federal/state relationships generally. The issue of Indian rights, the salmon industry and its

future, and the continued advancement of a once backward people in a pioneer state, are all matters of great consequence. Such questions and other which tread closely upon the heels of this case may well require judicial determination. But appellee urges that questions of such magnitude be not decided in this case or in any case where they are not squarely and properly presented, and certainly not in a case rendered moot by the passage of time.

For the Court's information, the Chief and two Associate Justices of the State Supreme Court have been appointed, and it is expected that the said court will be functioning within thirty days. No information is available which would suggest an answer to the question whether or not the State Supreme Court will review decisions of the interim courts which have constituted Alaska's judicial system since January 3, 1959.

Dated at Juneau, Alaska, this 16th day of September, 1959.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, [redacted]

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, *Appellant*,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees*.

On Appeal From the District Court for the State of Alaska

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 326

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, *Appellant,*

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees.*

On Appeal From the District Court for the State of Alaska

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

I.

APPELLEES' SUGGESTION OF MOOTNESS IS FOUNDED ON A MISUNDERSTANDING OF THE APPLICABLE LEGAL PRINCIPLES.

Appellees' motion is based, for all practical purposes, on a single contention, namely that the "real issues of this litigation are moot." (Appellees' Brief, page 6.) Analysis of this contention demonstrates that appellees have misunderstood the fundamental

issues of this case and have, as a result, misapplied the doctrine of mootness.

To decide whether the case is moot, its present posture must be determined. The court below, on appellees' motion prior to answer, dismissed appellant's complaint. The relevant well-pleaded allegations of that complaint, unaffected in any way by subsequent intervening events, are as follows:

(1) Appellant is an Indian community, residing on the Annette Island Reserve, an area granted it by Congress in 1891. (Complaint, II(b); R. 8.)

(2) By Presidential proclamation, 39 Stat. 1777 (1916), appellant was given the exclusive right to fish to a distance of 3000 feet from the shore of the Annette Island reserve at mean low tide. (Complaint, II(e); R. 9.)

(3) Section 4 of the Alaska Statehood Act provides that the "State and its people . . . forever disclaim all right and title . . . to any lands or other property (including fishing rights), the right or title to which may be held by any Indians . . . or is held by the United States for said [Indians]; that all such lands or other property . . . shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority. . . ." 72 Stat. 339 (1958). (Complaint, II(i); R. 11-12.)

(4) Appellant asserts the right to fish in the area of its exclusive jurisdiction subject to Federal regulation only. It has fished and will continue to fish by fish traps. Appellant is economically dependent on its right to continue to do so. (Complaint, IV-IX; 13-15.)

(5) Appellees have asserted the power, under State law, Session Laws of Alaska, Chs. 17, 95 (1959), to regulate appellant's fishing rights, to countermand Federal regulations, and to invoke State criminal sanctions against appellant's agents even though the latter are acting in conformity with Federal regulations. (Complaint, XII; R. 17.)

(6) Appellees' threatened action is in violation of the laws of the United States, most specifically of Section 4 of the Alaska Statehood Act. (Complaint, XIV; R. 18-19.)

In summary, it is appellant's claim that until Congress takes further action pursuant to Section 4 of the Alaska Statehood Act, the Metlakatlans' right to fish in the area set aside for them is subject to Federal regulation only, and that any effort by the State to regulate that right is illegal and should be enjoined.

In suggesting that this case is moot, appellees rely on the fact that Federal regulations governing Indian fishing in Alaska have, in the past, been issued annually, that the regulations for the 1959 season no longer have any force because the season is over, and that no regulations for the coming year have as yet been published. They also argue that the authority of the Federal Government to protect *all* fisheries and wildlife in Alaska expires on January 1, 1960, pursuant to Section 6(e) of the Alaska Statehood Act, 72 Stat. 340 (1958). But all that is beside the point. It is not the exercise of *Federal* authority that is here sought to be enjoined. This injunctive proceeding is directed against the *State* and can be rendered moot only if the State ceases to interfere with appellant's

right to fish[1] or if Congress grants the State the power which it now lacks to regulate Indian fishing rights.

In granting a stay in this case, Mr. Justice Brennan stated that one of the questions on which review will be sought was the following:

> "Is § 4 of the Alaska Statehood Act and Art. 12, § 12 of the Alaska Constitution a permanent disclaimer by the State of Alaska of control over Indian fishing within the State, and, if so, is § 4 of the Statehood Act an assumption of permanent jurisdiction by the Federal Government over the location and manner of Indians' fishing within the State?"[2] Opinion of Mr. Justice Brennan, Circuit Justice, on appellant's motion for stay, 80 Sup. Ct. , (1959).

This, then, is the question before the Court. It is a live, justiciable question. Just what Federal regulations are in effect at any particular time is irrelevant.

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[1] Despite Section 4 of the Alaska Statehood Act, appellees continue to assert jurisdiction over appellant. See proposed regulations of the Alaska State Board of Fish and Game (reproduced in part in Appendix, *infra*, at 4a-6a). The proposed regulations purport to be issued pursuant to Chapter 94, Section 6, Session Laws of Alaska (1959). The regulations purport to be applicable to appellant, see § 101.1(*l*), and to require appellant, *inter alia*, to procure a commercial fishing license, § 102.1, and to register, § 102.2. Such assertions of "power to regulate fishing by Indians in their own reservation," are in clear violation of the reservation to the United States of "absolute jurisdiction and control" contained in Section 4 of the Alaska Statehood Act. See *Tulee* v. *State of Washington*, 315 U.S. 681, 683 (1942), where this Court on appeal held invalid an attempt by the State of Washington to charge the Indians a fishing license fee, even where the Indians' right to fish was to be exercised in common with the citizens of the State.

[2] The question of whether the jurisdiction of the State is limited by Section 6(e) of the Alaska Statehood Act is admittedly moot.

The key issue raised by the pleadings is that the State lacks the power to regulate. It lacks that power irrespective of the action of the Executive branch of the Federal Government. Until Congress acts to vest jurisdiction in the State, the latter is simply excluded from this area of law enforcement. Cf. *Williams* v. *Lee,* 358 U.S. 217 (1959).

An appeal may be dismissed as moot if the alleged illegal activity has been discontinued and there is a bona fide intention not to resume the wrongful acts, *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419, 421 (1945); *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633 (1953); or if, pending review, something occurs which renders it impossible to grant the plaintiff effectual relief, *Jones* v. *Montague,* 194 U.S. 147, 152 (1904); *Richardson* v. *McChesney,* 218 U.S. 487, 492 (1910). Neither rule would govern this case. The fish are expected to reach Annette Island by the time of the 1960 season, appellant expects to operate its fish traps, and appellees will interfere with appellant's fishing operation. This case is thus clearly ripe for judicial determination.

Beyond these legal considerations, there is serious doubt whether appellees have correctly analyzed the facts. Appellees have asserted most emphatically that the regulations issued on March 7, 1959 apply to the 1959 fishing season only. A close reading of these regulations, however, casts doubt on the correctness of this assertion. In his statement of "Basis and Purpose," preceding the actual text of the regulations, the Secretary of the Interior states the following (24 Fed. Reg. 2054, Mar. 19, 1959):

> "It has been determined that the use of fish traps as a means of taking salmon in Alaskan

> waters shall be permitted only at not to exceed the eight sites customarily operated within the Annette Island Fishery Reserve; not to exceed the nine sites customarily operated by the organized Village of Kake; and not to exceed the four sites customarily operated by the Angoon Community Association. Within the limitations stated, *the number of Indian traps to be permitted to operate will be determined from time to time by the Secretary of the Interior.* Because of the relatively poor salmon runs expected in Southeastern Alaska during the 1959 cycle, and the need for insuring the escapement of adequate spawning stocks, it has been determined that only eleven of the twenty-one Indian traps can be permitted to operate *during the 1959 season."* [Emphasis added.]

It is respectfully submitted that the foregoing statement, while indicating what the Secretary planned to do in 1959, is also a statement of a continuing policy, namely to permit the operation of not to exceed twenty-one Indian fish traps, the exact figure to be determined annually.

Even if the fact that the Federal fishing regulations are annual in nature had any relevance to this case, it would not render the case moot. As was pointed out in *United States* v. *W. T. Grant Co., supra,* "a dispute of the legality of the challenged practices," combined with "a public interest in having the legality of the practices settled, militates against a mootness conclusion." *Id.* at 632. And in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498 (1911), the Court observed:

> "[T]he questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar)

> and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government, and at another time the carriers have their rights determined by the Commission without a chance of redress." *Id.* at 515.

In the instant case the Interior Department has clearly asserted its right to continue to regulate Indian fishing in Alaska. On March 10, 1959 the Acting Secretary of the Interior wrote to the Alaska Area Director:

> "As you know, under section 4 of the act of July 7, 1958 (72 Stat. 339) the State of Alaska disclaimed jurisdiction over any lands or other property, including fishing rights, held by any Indians, Eskimos, or Aleuts, or which is held by the United States in trust for them, and recognized continuing federal authority thereover. This disclaimer, coupled with the longstanding supervisory control exercised for the protection of the interests of Indians, Eskimos, and Aleuts by the Department of the Interior, accounts for the provision that the proposed regulations will not eliminate operation of fish traps by Indian tribes or villages. The Secretary will continue to control the operation of traps by Indian tribes and villages." Appendix herein at 1a.

To provide the flexibility which proper conservation practices demand, Federal regulations concerning the use of fish traps are issued annually. If that fact were to render this case moot, the basic question here involved could never be determined by this Court, as the fishing season follows the issuance of regulations so closely that it would invariably be over by the time the

case reaches the Supreme Court of the United States.[3] This is the very situation against which this Court guarded by rejecting a suggestion of mootness in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission, supra.*

II.

THE DISTRICT COURT'S FAILURE TO APPLY SECTION 4 OF THE ALASKA STATEHOOD ACT TO UPHOLD THE AUTHORITY OF THE SECRETARY OF THE INTERIOR RAISES A SUBSTANTIAL QUESTION.

A. The Secretary of the Interior Has Acted and Will Continue to Act Under Section 4 of the Alaska Statehood Act. Appellant Has Asserted Its Rights Under That Section.

In their motion, appellees, rather than trying to meet any argument arising out of Section 4 of the Alaska Statehood Act, attempt to sweep it aside. The court below followed a similar policy.

Appellees contend that appellant was in error when it asserted that the Secretary of the Interior interprets Section 4 as giving him authority over appellant's commercial fishing activities. This Court, appellees say, "should not unnecessarily speculate as to whether or not in the future any claim to a Federal right can be made under Section 4" of the Alaska Statehood Act. (Appellees' Brief, page 6.)

In advancing their contention appellees rely largely on what they claim to be the statement of the authority of the Secretary of the Interior, "as required by the Administrative Procedure Act," contained in the regulations of March 7, 1959. They assert that that state-

[3] In all likelihood it shall never again be possible to reach this Court as quickly as was possible in this case, since an appeal lay directly from the trial court to the Supreme Court of the United States.

ment "clearly claims [the Secretary's] authority for his regulations as being the White Act and § 6(e) of the Statehood Act, not § 4 of the Statehood Act." (Appellees' Brief, page 13.)

The fact of the matter is that the Statement of Authority "as required by the Administrative Procedure Act," which appears following Part 101 of the regulations, 24 Fed. Reg. 2054, reads as follows:

> "AUTHORITY: §§ 101.1 to 101.22 issued under sec. 1, 43 Stat. 464, as amended; 48 U.S.C. 221."[4]

The only question that could arise is what the words "as amended" mean. Do they encompass Section 4 of the Statehood Act? Appellees say they do not, that they refer only to Section 6(e). In support of this assertion they seem to rely exclusively on the narrative statement of policy which precedes the regulations. That statement discusses the regulations in a general way and explains that the entire range of regulations, concerning non-Indians as well as Indians, were continued in effect under Section 6(e). A mere reading of the text makes it clear that the statement does not purport to be all-inclusive, nor does it purport to be a statement of authority under the Administrative Procedure Act.

The fact of the matter is that on March 10, 1959, almost contemporaneous with the publication of the regulations, the Secretary wrote to the Alaska Area Director that the disclaimer under Section 4 "coupled with the longstanding supervisory control exercised for the protection of the interests of the Indians, Es-

[4] This statement is repeated an additional fourteen times throughout the regulations, with appropriate changes of the references to sections of the regulations.

kimos and Aleuts by the Departments of the Interior, accounts for the provision that the proposed regulations will not eliminate operation of fish traps by Indian tribes or villages." Appendix herein at 1a. On May 29, 1959 he advised appellee Egan to the same effect:

> "Supplementing my letter of May twentyeight the following telegram has today been sent to Mayor Littlefield of Metlakatla Quote In reply to your telegram of May twentyseven the Department of the Interior has not changed its position with respect to the status of Indian owned fish traps. *It is our view that Section Four of the Alaska Statehood Act recognizes and protects Indian fishing rights and reserves absolute jurisdiction in the United States over them until disposed of under Federal authority.* Sections 102.10 and 115.26 of the revised regulations for Alaska Commercial Fisheries for 1959 were adopted in conformity with existing laws and we know of no reason to amend or modify these sections which now permit operation of native Indian owned fish traps Unquote
>
> "Will discuss matter at your convenience. Please advise." Appendix herein at 2a. [Emphasis added.]

That the Secretary could not have issued his regulations concerning Indian fish traps if it were not for Section 4 is further established if this Court's decision in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949), is kept in mind. In that case this Court held that under the White Act, 43 Stat. 464 (1924), as amended, 48 U.S.C. §§ 221, 222, the Secretary may not grant fishing privileges in a manner which would favor Indians. Clearly the Secretary must have thought that the White Act had been amended to permit such discrimi-

nation. And when he was challenged on that question in *Ketchikan Packing Co.* v. *Seaton*, 267 F. 2d 660 (D.C. Cir. 1959), this is exactly what he told the Court of Appeals. As can be seen from Secretary Seaton's brief in the Court of Appeals in the *Ketchikan* case (see Appendix herein at 3a-4a), the Secretary clearly and unmistakably relied on the assumption that his authority stemmed from the White Act *as amended by Section 4 of the Alaska Statehood Act.*

The words "as amended," as they appear in the statement of authority in the regulations must, therefore, be construed to include Section 4 of the Alaska Statehood Act.

B. Section 4 of the Alaska Statehood Act Protects the Rights of Appellant Which Are Here Asserted.

Once it is recognized that the Secretary has acted under Section 4 of the Alaska Statehood Act, we reach the question of whether he interpreted Section 4 correctly. As shown by the regulations, he construed the law as permitting him to authorize trap fishing, the laws of the State of Alaska to the contrary notwithstanding.

It has been held that the Secretary's interpretation of the powers conferred upon him "is entitled to considerable weight." *Ketchikan Packing Company* v. *Seaton, supra,* 267 F. 2d at 663. When such an interpretation is held incorrect by the courts, this may in itself raise a substantial question. Beyond that, however, it can be shown that the Secretary was indeed correct.

Appellees suggest that appellant has conceded that before it has a substantial Federal right pursuant to Section 4, there must be additional legislation. This

is most certainly *not* the case. Section 4 quite plainly preserved the rights that existed prior to statehood. Its very purpose was to avoid judicial construction of the Statehood Act as wiping out native rights, such as occurred in *Ward* v. *Race Horse,* 163 U.S. 504 (1896). Yet the Court below relied rather heavily on the *Race Horse* case. (174 F. Supp. 500, at 503; R. 187.) Such reliance was clearly erroneous.

Appellant's rights derive from the act creating the Annette Island Reserve, 26 Stat. 1095, 1101 (1891), 48 U.S.C. § 358. Those rights were recognized by this Court in *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918), and expanded by Presidential Proclamation, 39 Stat. 1777 (1916). The latter Proclamation reserves a specified area for the Metlakatlans "to be used by them under the general fisheries laws and regulations of the United States." *Id.* at 1778. That is the specific right which Section 4 preserved.

C. Section 4 of the Alaska Statehood Act Is Constitutional.

As Mr. Justice Brennan has pointed out, this Court will, if it construes Section 4 of the Alaska Statehood Act to uphold the Indians' right to fish with traps, have to reach the issue of the constitutionality of that section under the so-called "equal footing" doctrine. If the opinion of the Court below is interpreted as holding that Section 4 may violate the "equal footing" doctrine, such holding is clearly erroneous and also raises a substantial question.

Appellees have contended that if Section 4 restricts the powers or sovereignty of the State of Alaska it is unconstitutional because Alaska is entitled to be admitted "on the same footing" as the other states. As

will here be shown, the doctrine that a compact between a State and the Federal Government limiting future State sovereignty is void applies only where there is no independent authority for such limitation in the Constitution. It will further be shown that such independent Constitutional authority exists in the instant case.

That a limitation based on the Constitution defeats the "equal footing" doctrine is clear even from a cursory reading of the cases relied on by appellees. In *Pollard* v. *Hagan,* 44 U.S. (3 How.) 212 (1845), the Court said:

> "[I]f an express stipulation had been inserted in the agreement [to admit Alabama as a state], granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because, the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, *except in the cases in which it is expressly granted." Id.* at 223. [Emphasis added.]

And in *Coyle* v. *Smith,* 221 U.S. 559 (1911), the Court expounded further on this proposition:

> "In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the State; second, between compacts or affirmative legislation intended to operate *in futuro,* which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new States in respect of matters which would otherwise be exclu-

> sively within the sphere of state power." *Id.* at 568.

As an example of cases falling into the second class, the Court pointed out:

> "[S]tipulations . . . in respect to the control by the United States of the large Indian reservations and Indian population of the new State, are found in the Oklahoma enabling act. Whatever force such provisions have after the admission of the State may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the state." *Id.* at 570.

Thus the Court has explained that it is not the character of the limitation as a compact or agreement that is controlling. What is vital is whether Congress has authority to legislate in this area.

The power of Congress to legislate in the field of Indian affairs stems from the clause in the Constitution permitting Congress to regulate commerce with the Indian tribes, Article I, Section 8, Clause 3. That power has been described as "Plenary," *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565 (1903), and as "paramount and of a most sweeping character." *People* ex rel. *Ray* v. *Martin,* 294 N.Y. 61, 60 N.E. 2d 541, 545 (1945), *aff'd,* 326 U.S. 496 (1946). It has been recognized as a limitation of the rights of states to apply their criminal laws in the Indian country in a long line of cases from *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), to *Williams* v. *Lee, supra.* As this Court said in the latter case:

> "[W]hen Congress has wished the States to exercise . . . power [over Indians] it has expressly

granted them the jurisdiction which *Worcester* v. *Georgia* had denied.'"[5] *Id.* at 221.

It is thus clear that the regulation of Indian fishing rights is a matter under Federal jurisdiction and that such jurisdiction is exercised under the Indian commerce clause. It follows that Congress clearly had the power to enact Section 4 of the Alaska Statehood Act.

WHEREFORE, on the basis of the foregoing, appellant prays that appellees' motion to dismiss or affirm be denied, and that this Court note probable jurisdiction.

Respectfully submitted,

RICHARD SCHIFTER
THEODORE H. LITTLE
Attorneys for Appellant

Of Counsel:

DANIEL M. SINGER
STRASSER, SPIEGELBERG, FRIED & FRANK

Dated: November 13, 1959

---

[5] Express disclaimers are contained in the Statehood Acts admitting Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota and Washington. Typical is the disclaimer provision in Section 4 of the Act admitting South Dakota, North Dakota, Montana and Washington, 25 Stat. 676, 677 (1889), which declares:

"And said [state constitutional] conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of the said States:

". . .

"Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, *the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States* . . . ." [Emphasis added.]

This language is virtually identical with the language in Section 4 of the Alaska Statehood Act.

APPENDIX

APPENDIX

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

Air Mail

March 10, 1959

Dear Mr. Hawkins:

The Department's press release of November 14, 1958 announced the notice of public hearing on the proposal to adopt amendments to existing regulations for the protection of commercial fisheries in Alaska, published in the Federal Register of November 14, 1958. As stated in the release, publication followed the decision on November 8 to propose elimination of all fish traps except those owned by Indian tribes or villages.

The proposal to eliminate fish traps in the pending regulations was motivated by the desire of the Department to adjust its actions as quickly as possible to the desires of the Alaskans in regard to the control of their natural resources. The people of Alaska twice voted in referendum to abolish traps.

As you know, under section 4 of the act of July 7, 1958 (72 Stat. 339) the State of Alaska disclaimed jurisdiction over any lands or other property, including fishing rights, held by any Indians, Eskimos, or Aleuts, or which is held by the United States in trust for them, and recognized continuing federal authority thereover. This disclaimer, coupled with the longstanding supervisory control exercised for the protection of the interests of Indians, Eskimos, and Aleuts by the Department of the Interior, accounts for the provision that the proposed regulations will not eliminate operation of fish traps by Indian tribes or villages. The Secretary will continue to control the operation of traps by Indian tribes and villages.

The Angoon Community Association, the Organized Village of Kake, and the Metlakatla Indian Community may proceed to make plans for operation of their salmon canneries in 1959 on the basis that they will be permitted to continue to operate the number of fish traps consistent with proper conservation practices recommended by this Department.

Sincerely yours,

/s/ ELMER F. BENNETT
Secretary of the Interior

MR. JAMES E. HAWKINS
Area Director,
Juneau, Alaska

Copy to Credit and to Solicitor

DEPARTMENT OF INTERIOR
OFFICE OF THE SECRETARY

TELETIPE

HON WILLIAM A EGAN
GOVERNOR OF ALASKA
JUNEAU ALASKA

MAY 29 1959

VIA PBX

SUPPLEMENTING MY LETTER OF MAY TWENTYEIGHT THE FOLLOWING TELEGRAM HAS TODAY BEEN SENT TO MAYOR LITTLEFIELD OF METLAKATLA Quote IN REPLY TO YOUR TELEGRAM OF MAY TWENTYSEVEN THE DEPARTMENT OF THE INTERIOR HAS NOT CHANGED ITS POSITION WITH RESPECT TO THE STATUS OF INDIAN OWNED FISH TRAPS. IT IS OUR VIEW THAT SECTION FOUR OF THE ALASKA STATEHOOD ACT RECOGNIZES AND PROTECTS INDIAN FISHING RIGHTS AND RESERVES ABSOLUTE JURISDICTION IN THE UNITED STATES OVER THEM UNTIL DISPOSED OF UNDER FEDERAL AUTHORITY. SECTIONS 102.10 AND 115.26 OF THE REVISED REGULATIONS FOR ALASKA COMMERCIAL FISHERIES FOR 1959 WERE ADOPTED IN CONFORMITY WITH EXISTING LAWS AND WE KNOW OF NO REASON TO AMEND OR MODIFY THESE SECTIONS WHICH NOW PERMIT OPERATION OF NATIVE INDIAN OWNED FISH TRAPS Unquote

WILL DISCUSS MATTER AT YOUR CONVENIENCE. PLEASE ADVISE

/S/ FRED A SEATON
SECRETARY OF THE INTERIOR

Excerpts From Brief for Appellee Seaton in Ketchikan Packing Co., v. Seaton, 267 F. 2d 660 (D.C. Cir. 1959), at pp. 26-27 (mimeo).

4. Ignoring the provisions of the Statehood Act and the entirely new situation it created, appellants attempt to equate the present case with that which was before the Supreme Court in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949). Having thus turned back the clock, they argue that the White Act's anti-discrimination proviso, as construed in *Hynes,* precludes the Secretary from permitting the use of fish traps on certain native Indian sites while banning their use elsewhere.

But by virtue of the Statehood Act Alaska is no longer a territory. As we have seen, that Act amended the White Act to require the Secretary to administer in the interests of Alaska all of its fish resources except where Indian fishing rights are involved. Section 4 of the Statehood Act made an exception for such rights, reserving them to the absolute jurisdiction and control of the United States. The Statehood Act thus created two different categories of fish resources to be administered under the amended White Act, where there previously had been one. Indian fishing rights, expressly placed beyond the reach of Alaska's Constitution, are to continue indefinitely under unfettered federal control.[3] In all other respects the new State's marine resources are to be administered by the Secretary merely for a transitional period and in accord-

[3] Historically, the government of the Territory of Alaska has acknowledged and recognized the unique status of these native fishing rights. In an opinion directed to the general Superintendent of the Alaska Native Service, dated July 26, 1949, the Attorney General of Alaska held that Section 35-1-11, ACLA 1949, as amended by Chapter 11, SLA 1949, the Alaska Fish Trap License Tax, was not applicable to the Metlakatla community of Indians on the Annette Island Reserve nor to any Indian chartered corporation. As a result, Alaska has not required a license for the Indian traps in question.

ance with the State Constitution approved in § 1 and made applicable to the White Act by §§ 6(e) and 8(d). In these circumstances it would be plainly absurd to construe the White Act's anti-discrimination proviso to invalidate measures applicable to one category of the Secretary's responsibilities on the ground that those measures have not also been applied to the other, wholly different category for which they are obviously inappropriate.

Rather than harmonize the two federal statutes, appellants' view of the White Act's anti-discrimination proviso would impale the Secretary on the horns of a dilemma. If he interprets the Westland proviso to avoid running afoul of the "equal footing" clause, they insist that he must also subject Indian fishing rights to Alaskan law contrary to § 4 or else violate the White Act proviso. On the other hand, if he permits Indians to maintain their fish traps as contemplated by § 4, appellants claim that the White Act proviso then requires him to permit fish traps generally in Alaska and thereby violate the "equal footing" clause. Nothing could more transparently demonstrate the fallacy of contending that Congress, in amending the White Act, intended the anti-discrimination proviso to apply in the same manner to the different situations created by §§ 4 and 6(e) of the Statehood Act.

Proposals for Regulating Commercial Fishing in Alaska to be Considered by the Alaska Board of Fish and Game at the November 1959 Meeting.

General authority for regulation: Section 6; 94, SLA 59 By Alaska Board of Fish and Game

101.1 Meaning of terms, abbreviations, and symbols.

For the purpose of these regulations the following shall be construed to mean:

. . .

(k) "Commercial fishing"—the taking, fishing for, or possession of fish, shellfish, or other fishery re-

sources with the intent of disposing of such fish, shellfish, or other fishery resources or parts thereof for profit, or by sale, barter, trade, or in commercial channels.

(*l*) "Commercial fisherman"—an individual who fishes commercially for, takes or attempts to take, fish, shellfish, or other fishery resources of Alaska by any means, and including every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery products above mentioned, whether such participation be on shares or as employee or otherwise; Provided, however, this shall not apply to anyone aboard a licensed vessel merely as a visitor or guest who does not directly or indirectly participate in the said taking. The term "commercial fisherman" shall also include the crews of tenders or other floating craft used in transporting fish.

. . .

101.20 Waters of Alaska.

For the purpose of the regulations in this part, the term "waters of Alaska" north and west of the International Boundary at Dixon Entrance are defined as including those extending three miles seaward.

(a) From the coast.

(b) From lines extending from headland to headland across all bays, inlets, straits, passes, sounds and entrances.

(c) From an island or group of islands, including the islands of the Alexander Archipelago, and the waters between such groups of islands and the mainland.

. . .

102.1 Licenses required of commercial fishermen.

(a) All commercial fishermen, gear and vessels shall have all required licenses before fishing in any waters of Alaska.

. . .

102.2 Registration of fishing vessels and gear.

(a) Only vessels and gear registered with the local representative of the Department shall be used in commercial fishing in the area of intended operation. Registration, with the exception of salmon net fishing, may be done any time previous to commencing fishing.

. . .

102.10 Legal gear, salmon fishing.

Fishing for or taking salmon is permitted by drift gill nets, set nets, purse seines, hand purse seines, beach seines, fish wheels, trolling apparature, hand lines, rods, spears and gaffs.

LE COPY

Office Supreme Court, U.S.
FILED
DEC 2 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 325 & 2

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
Appellee.

ORGANIZED VILLAGE OF KAKE,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
Appellee.

No. 327 & 3

ANGOON COMMUNITY ASSOCIATION,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
Appellee.

ON APPEAL FROM THE DISTRICT COURT FOR THE STATE OF ALASKA

BRIEF OF APPELLEE IN REPLY TO BRIEFS OPPOSING MOTION TO AFFIRM OR DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 326

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
Appellee.

ORGANIZED VILLAGE OF KAKE,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
Appellee.

No. 327

ANGOON COMMUNITY ASSOCIATION,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
Appellee.

ON APPEAL FROM THE DISTRICT COURT FOR THE STATE OF ALASKA

ORGANIZATION OF BRIEF

There are several reasons why the United States Supreme Court should not take jurisdiction of this case at this time. They may be summarized as follows:

1. The issues before the district court judge are now moot.
2. Those which are not moot are speculative.

3. The district court is not the highest court of the State in which a decision could be had.

Points one and two, above, were discussed in the appellee's brief in support of its Motion to Affirm or Dismiss and will not be argued further at this time. Accordingly, the argument in this reply brief will be limited to a discussion of point number 3, above. In order to place the argument in its proper perspective, a chronological historical statement will be necessary. The brief will therefore contain: (1) a historical statement; (2) a statement of issues raised; (3) a brief argument; and (4) a conclusion.

Historical Statement

1. *January 3, 1959,* Alaska admitted to the Union. Pursuant to presidential proclamation, Alaska was admitted to the Union "on an equal footing with the other States of the Union" at one minute past noon on the third day of January, 1959. (F.R. Doc. 59-169; Filed Jan. 5, 1959, 10:59 A.M.)

2. *January 3, 1959,* State Constitution took effect. Article XV, Section 25, provides as follows:

> "This constitution shall take effect immediately upon the admission of Alaska into the Union as a state."

(a) The State Constitution, in its "Schedule of Transitional Measures," Article XV, provides, *inter alia:*

> "Section 17. Transfer of court jurisdiction. Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system *shall remain as constituted* on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced

and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law." (Emphasis added)

(b) The State Constitution, in Article IV, entitled "THE JUDICIARY," provides, in pertinent part, as follows:

"Section 1. Judicial power and jurisdiction. The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

"Section 2. Supreme Court. The supreme court shall be the highest court of the State, with final appellate jurisdiction. It shall consist of three justices, one of whom is chief justice. The number of justices may be increased by law upon the request of the supreme court."

3. *January 3, 1959,* Statehood Act became fully effective. The Statehood Act, Pub. Law 85-508, 72 Stat. 339, provides for a transitional court system in the following language:

"Sec. 18. The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, *shall not be effective until three years after the effective date of this Act,* unless the President, by Ex-

ecutive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function as provided in this section." (Emphasis added)

4. *June 16, 1959,* Ninth Circuit Court ruled against its jurisdiction. On June 16, 1959, in the case of *Parker* v. *McCarrey,* 268 F. 2d 907, the United States Court of Appeals, Ninth Circuit,[1] ruled that it had no jurisdiction to review judgments rendered in the District Court for the Territory of Alaska after January 3, 1959, i.e., after statehood. The petitioners in the case sought writs of prohibition and mandamus directed to the Honorable J. L. McCarrey, Jr., District Judge of the District Court for the Territory of Alaska. The Attorney General of Alaska filed a brief as *amicus curiae,* urging, *inter alia,* that the Ninth Circuit Court of Appeals had jurisdiction to hear cases from the "transitional" district court under the provisions of the Statehood Act, § 18, *supra,* wherein the pro-

[1] At the time *Parker* v. *McCarrey* was before the Ninth Circuit Court, a similar suit, entitled *Kilpatrick* v. *McCarrey,* also involving a motion for leave to file a Petition for Writ of Prohibition and Mandamus, was before the United States Supreme Court. The Attorney General of Alaska joined as *amicus curiae* and submitted a brief *in this Court* wherein substantially the same arguments as were presented to the Ninth Circuit Court of Appeals in *Parker* v. *McCarrey* were made. The motion was denied. (No. 856, Misc., 360 U.S. 914, 3 L. ed. 2d 1532.)

visions of the "preceding sections" were suspended for up to three years, thereby, under the State's theory, leaving the Ninth Circuit Court of Appeals as well as the district court free to "function as heretofore." As aforesaid, the State's theory was not accepted. The court, incidentally, refused to comment on the nature of the "transitional" court. The language of the court leaves little doubt as to its policy in discussing the nature of the State's transitional court system:

> "In the spirit of helpfulness we might give our views on the current Alaska court situation, but if we cannot speak with the authority of a pronouncement that is required for decision, we deem it unwise to speculate as to the nature of the interim court. Thus, we must leave it on the basis of that which it is not, rather than on that which it is."

5. *June 22 and 23, 1959,* plaintiff below filed complaints seeking injunction. On the 22nd day of June, 1959, in the cases of *Kake and Angoon* v. *Egan,* and on the 23rd day of June, 1959, in the case of *Metlakatla* v. *Egan* (which suits were consolidated in the court below and are now reported in 174 F. Supp. 500), the plaintiffs filed complaints for injunctive relief. They sought to restrain the enforcement of state statutes banning fish traps. On June 29, 1959, in the district court at Juneau where the cases were argued, and before the parties began presenting their arguments to the court, the Honorable Raymond J. Kelly, district court judge, made a statement as to jurisdiction which appears in full in the record at page 130. The district judge said, in part:

> ". . . This is an interim court during the transition of the judicial system from the Territorial to the State status. As far as the Statehood Act is concerned, we

enjoy a dual personality. Whatever might be said in reference to the Federal end of it, there certainly seems to be no question at this time but what we are acting *as a State Court.*" (Emphasis added)

6. *July 10, 1959,* oral argument before Justice Brennan. The district court, upon motion of the defendant and after a two-day hearing, dismissed the complaints. Appeal was accordingly made to the only court available at that time, i.e., the United States Supreme Court, for an injunction pending appeal. Oral argument was had before Justice Brennan on July 10, 1959. The injunction was granted. During the course of oral argument, concern was expressed by all parties as to certain jurisdictional aspects of the case. The State did not, at that time, oppose jurisdiction. However, Chapter 151, Session Laws of Alaska 1959, effective May 1, 1959, had provided (subject to appointment of justices for the state supreme court, etc.) for appeals from the transitional district court to the Supreme Court of Alaska. Chapter 151 (amending Chapter 50, Session Laws of Alaska) provides, in pertinent part, as follows:

"... In the event that a court of competent jurisdiction, by final judgment, declares that the United States Court of Appeals for the Ninth Circuit lacks jurisdiction to hear appeals from the District Court of the District of Alaska, the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices of the supreme court and appeals from the District Court of the District of Alaska may be made to the State Supreme Court...."

Justice Brennan asked the Attorney General, during oral argument, when the supreme court justices might be expected to be appointed; and a tentative schedule, based

upon such information as was available at that time, was furnished. In his opinion of July 11, 1959, Justice Brennan, at page 9, expressed interest in the jurisdiction of the United States Supreme Court to entertain this case on appeal in the following language:

> "Another question which will face this Court is whether it has jurisdiction to review the judgment of the District Court. Jurisdiction was not questioned by the parties of the Solicitor General of the United States on the oral argument, but the petitioners indicated that they will seek review on the theory that the judgment below is a judgment of the highest available court of the State. I am satisfied that there is a prospect that the Court will want to take the case to decide *whether it has jurisdiction in this regard.*" (Emphasis added)

The State, on oral argument, reserved the question whether appeal or certiorari lay to the United States Supreme Court, as well as other jurisdictional questions.

7. *July 29, 1959,* state supreme court justices appointed. The state supreme court justices were appointed by Governor William A. Egan on the 29th of July, 1959.[2]

8. *October 5, 1959,* state supreme court rules became effective. The Supreme Court of Alaska has, since the State submitted its Motion to Affirm or Dismiss on September 16, 1959, published the supreme court rules, to be effective October 5, 1959. Rule 54(a) provides as follows:

> "(a) *Appeals from District Court.* These rules shall be applicable to appeals from the District Court of the

[2] In this connection, it is interesting to note that on November 9, 1959, the Governor appointed the eight superior court judges, who will take office on November 27, 1959. The rules of civil and criminal procedure for the superior and magistrates courts have just been published. The State expects to have its full judicial system in operation by the first of the year or shortly thereafter.

> District of Alaska which may be allowed in accordance with the provisions of Section 32 (4) of Chapter 50 SLA 1959, as amended by Chapter 151 SLA 1959."

The time for filing notice of appeal was extended by the state supreme court to allow appeals from judgments rendered since statehood (January 3, 1959). The pertinent rule—Rule 54(b)—provides:

> "(b) *Time for Filing Notice of Appeal.* The time for filing a notice of appeal as provided in these rules is extended so that the time for filing such notice will begin to run from the effective date of these rules instead of the effective date of the judgment."

Rule 7 of the new state supreme court rules clearly shows that the appellants herein still have ample time within which to file notice of appeal.

> "Rule 7. *Appeal: Time—Notice—Bonds.*
>
> "(a) *When Taken.* The time within which an appeal may be taken to the supreme court shall be thirty (30) days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the state or an officer or agency thereof is a party, the time as to all parties shall be sixty (60) days from such entry, . . ."

Issues Raised

The foregoing events, when considered from the standpoint of jurisdiction, raise a number of issues. These will now be considered.

1. In the court below there was drawn into question the validity of two state statutes—Chapters 17 and 95, SLA 1959. The plaintiffs sought to enjoin the Governor from enforcing the same on the ground of repugnance to

the Constitution and laws of the United States (complaint of Angoon, R-33; complaint of Kake, R-11; complaint of Metlakatla, page 13.). The question is therefore pertinent whether the lower court was a "district court" within the meaning of § 2281 of Title 28 U.S.C., wherein it is provided that:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any *district court* or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (Emphasis added)

All the necessary allegations to support federal jurisdiction were made in the complaints below (e.g., the complaint of Metlakatla in the district court, p. 8); and it appears that the petitioners, in drafting the complaints, were fully prepared to treat the lower court as a federal court.

2. Assuming that the lower court was a "district court" within the meaning of § 2281 of Title 28 U.S.C., would it have been possible for a three-judge court to have been convened in view of the provision in § 2284 of Title 28 U.S.C., which requires that the chief judge of the circuit:

> ". . . designate two other judges, at least one of whom *shall be a circuit judge. . . .*" (Emphasis added)

It is at best doubtful whether such a court could have been convened in view of the decision in *Parker* v. *McCarrey, supra,* wherein it was decided by the Ninth Circuit

Court of Appeals that it had no jurisdiction over appeals from the interim or transitional state courts in Alaska. In the absence of jurisdiction, how could the circuit court provide a circuit judge?

3. Assuming, on the other hand, that the lower court was, for the purposes of the instant case at least, a state court, was not the lower court bound by existing state statutes as to jurisdiction of the state supreme court in the case of appeals as provided for in Chapter 151, SLA 1959, *supra*?

Are federal questions raised if doubt exists concerning jurisdiction of appeals from the interim courts to the state supreme court, or are questions involving the state judiciary purely matters of state concern? If the state supreme court provides in its rules for appeals from the interim courts, are any federal questions involved when and if those rules are attacked?

4. Justice Brennan took jurisdiction of the case in order to protect an asserted federal right by means of a temporary injunction. A state statute, at the time he granted interlocutory relief, provided that the impending state supreme court would have jurisdiction to hear appeals from judgments rendered in the interim district courts since January 3, 1959. Query: Is there a difference in taking jurisdiction in order to protect, by way of interlocutory relief such as a temporary injunction, an asserted federal right, and taking jurisdiction of a case for the purpose of making a determination on the merits? In other words, could the United States Supreme Court take jurisdiction in order to grant interlocutory relief while being precluded (by the existence or imminent creation of a state remedy) from granting final relief pursuant to a hearing on the merits?

5. Does the Supreme Court of Alaska have the exclusive right to hear the appeal in the instant case at this

time, or has the United States Supreme Court, having once taken jurisdiction—even though for a limited purpose —acquired an "indefeasible" jurisdiction?

6. Does the creation by a state of a court with appellate jurisdiction (by relation back) over an existing tribunal constitute a denial of any state or federal right to those who have (perhaps erroneously) relied upon the judgment of such existing tribunal as a "final judgment"?[3]

7. Alaska can and did consent to the continuing federal appellate jurisdiction of the Ninth Circuit Court of Appeals. (See § 17, Art. XV, of the State Constitution, *supra*, wherein "the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admis-

---

[3] *Freeborn* v. *Smith*, 2 Wall. 160, 17 L. ed. 922 (1865) is an instructive case which was commenced in the District Court for the District of Nevada while Nevada was still a territory. The trial resulted in a verdict for the plaintiffs and a motion for a new trial was overruled. The case went to the Supreme Court of the Territory, and affirmed. The case then came to the United States Supreme Court on a writ of error. Pending the writ of error, the Territory of Nevada became a state.

The Nevada Statehood Act made no provision for the cases then pending in the United States Supreme Court after statehood. Defendants in error moved to dismiss on the authority of *Benner* v. *Porter*, adjudging that the Supreme Court had no jurisdiction to review such a case without the further authority of Congress, for the reason that the territorial court, in which the judgment was rendered, was no longer in existence.

The hearing was postponed in order to allow Congress to provide for such cases. Congress did so.

It was argued that the subsequent legislation of Congress is ineffectual as a retrospective act interfering with vested rights; that the result of maintaining it would be *"to disturb and impair judgments, which at the time of its passage, were final and absolute."* (Emphasis added)

The court used language which may be appropos to our case:

> "It is well settled that where there is no direct constitutional prohibition, *a State may pass retrospective laws, such as, in their operation, may affect suits pending and give a party a remedy which he did not previously possess:* or modify an existing remedy, *or remove an impediment in the way of legal proceedings." Em*phasis added)

sion" until the courts provided for in Article IV of the State Constitution are formed.) The circuit court interprets the Statehood Act so as to deny appellate jurisdiction, notwithstanding the fact that Congress, in granting statehood, "accepted, ratified, and confirmed" the State Constitution. Two United States District Judges, in two different cases, held that the Ninth Circuit Court of Appeals had jurisdiction over both state and federal cases on appeal from the interim district courts in Alaska. (See *United States* v. *Egelak,* 173 F. Supp. 206; *United States* v. *Marone,* 172 F. Supp. 368.) In the latter case, quoted with approval in the former, the Court said:

> "I am of the opinion that there is a simple answer to this problem and that is that the United States Court of Appeals for the Ninth Circuit never lost its appellate jurisdiction over the present United States District Court in Alaska in either state or federal matters."

It may well be that a conflict between state and federal law is raised by virtue of conflicting interpretations of § 18 of the Statehood Act as evidenced by the decision of the Ninth Circuit in the *Parker* case and the contrary state decisions just referred to. Whether jurisdiction over appeals to the United States Supreme Court from the interim district courts is affected by the existence of such a conflict over a law having both federal and state overtones, is uncertain.

Argument

The State does not have answers to all the questions which have been raised in this brief. We believe, however, that in a case where all parties consented that the lower court was acting as a state court, in a case where it is virtually certain that the lower court COULD NOT have acted as a federal court (in view of the three-judge court dilemma,

supra), the furnishing of an appeal retroactively does not violate any state or federal right. (See *Freeborn* v. *Smith*, *supra*.)

We do not believe that the United States Supreme Court had jurisdiction to hear this case on its merits at the time oral argument was had before Justice Brennan, nor do we believe that such jurisdiction is vested in the United States Supreme Court at this time. We base the foregoing conclusion upon the fact that state law, at all times pertinent herein, provided for eventual appeal of decisions rendered in the interim district courts to the state supreme court.

We concede, however, that the United States Supreme Court may have had jurisdiction to grant interlocutory relief to protect a federal right.

If the above conclusions are sound, then the provisions of 28 U.S.C., § 1257, requiring that this Court hear appeals only from the highest court of the state in which a decision could be had, are fully applicable. That the decision, to be reviewable, must be from the highest court of the state in which a decision could be had is beyond question. *Market Street R. Co.* v. *Railroad Commission*, 324 U.S. 548, 551. Accordingly, the appellants herein must file notice of appeal in the Supreme Court of Alaska and prosecute the same to judgment prior to invoking jurisdiction of this Court for a review on the merits.

The foregoing possibilities and tentative conclusions are submitted to the Court as above indicated not necessarily because we believe that we can present at this time compelling answers, but rather as additional argument as to why this Court should not take the case on its merits when the same is essentially moot. We believe that the moot and speculative argument earlier presented makes it unnecessary to delve into the almost impossible legal tangle which exists in the state and federal judicial system due to the

Parker v. *McCarrey* opinion. Because these matters involve grave constitutional questions of state and federal relationships, we feel certain that this Court will not be anxious to determine such questions if there is another sound basis for the disposition of the litigation. If, as a practical matter, the case is determined to be moot, it is submitted that future litigation, if any, concerning this matter will undoubtedly arise subsequent to January 1, 1960, subsequent to the creation of the full state judicial system, and subsequent to the proclamation of the President creating the constitutional United States District Court for the District of Alaska, as provided in § 18 of the Statehood Act, *supra.*

When these events have transpired, and if the Secretary does engage in further regulation after January 1, and if such regulation is inconsistent with the State Constitution, then a justiciable controversy may be presented through normal, customary and usual court systems, whether federal or state, without the attendant confusion inherent in this litigation in its present posture.

Conclusion

This additional brief has been offered to further advise the Court of the development of the state judicial system and some of the problems inherent in federal-state relationships, which must of necessity be determined, if this case is heard on its merits. As indicated earlier, we do not attempt to definitively anwer these serious constitutional questions of federal and state relationships. We feel it is unnecessary to delve into these matters because, as we have argued before, the case is moot.

Dated at Juneau, Alaska, this 25th day of November, 1959.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM [redacted] 1961

No. 382

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA,
Appellees.

On Appeal From the District Court for the State of Alaska

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 326

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation,
Appellant,

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Appellees.

On Appeal From the District Court for the State of Alaska

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the District Court for the State of Alaska (R. 59-66) is reported at 174 F. Supp. 500 (1959).

JURISDICTION

The judgment of the District Court was entered on July 2, 1959 (R. 69-70). The notice of appeal was filed on August 6, 1959 (R. 1-4). On December 7, 1959, this Court ordered:

> Further consideration of the question of jurisdiction is postponed to the hearing of the cases on the merits. (R. 76.)

The jurisdiction of this Court rests on 28 U.S.C. § 1257(1), (2).

QUESTIONS PRESENTED

1. Whether the jurisdiction of this Court over an appeal from the final judgment of the highest court of a State can be defeated by the creation of a still higher State court after the appeal to this Court has been perfected.

2. Whether the exclusive right granted appellant by the Act of March 3, 1891 to fish within its reservation subject only to Federal regulation was modified as a result of Alaska's elevation to statehood.

3. Whether Section 4 of the Alaska Statehood Act, which preserves Indian fishing rights in Alaska under the "absolute jurisdiction and control" of the United States, is unconstitutional.

STATUTES INVOLVED

1. Section 4, Alaska Statehood Act, 72 Stat. 339 (1958):

> As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or

other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe. . . .

2. Section 15, Act of March 3, 1891, 26 Stat. 1101, 48 U. S. C. § 358:

Annette Islands reserved for Metlakahtla Indians.

Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

3. Presidential Proclamation No. 1332, April 28, 1916, 39 Stat. 1777:

. . .

WHEREAS the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and

WHEREAS it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery,

Now, therefore, I, WOODROW WILSON, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned.

4. Constitution of the State of Alaska:

(a) Article XII, Section 12:

The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition and not granted or confirmed to the State or its political subdivisions, by or under the act

admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States.

(b) Article XV, Section 17:

Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law.

5. Chapter 95, Session Laws of Alaska, April 17, 1959:

Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; . . . nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives.

Sec. 2. Section 1 of Chapter 17, SLA 1959, is hereby amended to read as follows:

Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or

waters owned or hereafter acquired by the State of Alaska. . . .

. . .

Sec. 5. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year, or by a fine not to exceed $5,000.00, or by both such imprisonment and fine.

STATEMENT OF THE CASE

This suit arose out of an attempt by the newly-created State of Alaska to regulate the fishing rights of appellant, Metlakatla Indian Community, a Federally-chartered corporation located at the Annette Island Reserve in Southeastern Alaska. Specifically, appellant sued in the District Court for the State of Alaska to enjoin State officials from attempting by force of State criminal laws to prohibit appellant from exercising within an area set apart by Congress for its exclusive use its right to catch salmon by means of fish traps, in accordance with regulations promulgated by the Secretary of the United States Department of the Interior.

By Section 15 of the Act of March 3, 1891, 26 Stat. 1101, 48 U. S. C. § 358, Congress established a reservation encompassing all of the Annette Islands in Alaska—including the waters surrounding those Islands—for the use and benefit of the Metlakatla Indians. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918); *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86, 112-114 (1949). The Metlakatla Indian Community has at all times depended on fishing as the source of its economic support (R. 11). As this Court once had occasion to observe, it was their attractiveness for fishing purposes which caused the Metlakatlans to select the Annette Islands for a reservation. *Alaska*

Pacific Fisheries v. *United States, supra,* 248 U.S. at 88-89. In 1916 the exclusive fishery area granted by Congress in 1891 was defined by Presidential Proclamation No. 1332 as extending 3,000 feet from the shoreline at mean low tide. 39 Stat. 1777 (1916).

The 1891 statute and the 1916 Proclamation made explicit that appellant's right to use the resources of the Annette Islands was subject to Federal regulation and limitation. Federal regulations as to fishing by the Metlakatlans have been in effect for over forty years and continue to be in effect today (R. 6, 9-10, Appendix C, *infra* at 51). The validity of those regulations had not been disputed prior to Alaska's admission to statehood.

It was as a result of Alaska's admission to statehood that this controversy arose. Both Section 4 of the Alaska Statehood Act and Article XII of the Alaska Constitution provide specifically that Indian fishing rights "remain under the absolute jurisdiction and control of the United States." Acting pursuant to Section 4, the Secretary of the Interior, on March 7, 1959, issued regulations which allowed the operation of four fish traps by the Metlakatla Indian Community. 24 Fed. Reg. 2053, 2069 (1959).

The State of Alaska nevertheless asserted the power to superimpose its regulations on the Federal regulations by declaring the Metlakatlan fish traps illegal. Having enacted an anti-fish trap law, Ch. 95, Session Laws of Alaska 1959, the State asserted that this law applied to fishing by the Metlakatlans within their exclusive reservation, and threatened to imprison members of the Community responsible for the maintenance of the traps (R. 13, 40). To enjoin the threatened invasion of its rights on the reservation, the Metlakatla

Indian Community filed this suit. After an adverse judgment by the District Court for the State of Alaska, this appeal was taken.

On July 11, 1959 Mr. Justice Brennan entered a stay which permitted appellant to fish during the 1959 season and thereafter

> pending . . . disposition by this Court of said petitions . . . as [appellants] have been authorized by the Secretary of the Interior of the United States pursuant to his Regulation of March 7, 1959, 24 Fed. Reg. 2053, or as [appellants] may from time to time be authorized by him.

On April 6, 1960, the Secretary of the Interior continued to assert Federal jurisdiction over fishing by the Metlakatlans by issuing proposed regulations governing the future use of fish traps by appellant. 25 C.F.R. Pt. 88, 25 Fed. Reg. ..... (1960).

SUMMARY OF ARGUMENT

I.

A. This case is before this Court on appeal from a final judgment of the highest court of Alaska in which a decision could be had. The court below—formerly a territorial court—functioned after statehood as a State court. It was the only existing State court—and therefore the highest State court—at the time judgment was rendered and the notice of appeal was filed. Subsequent constitution of a State appellate court in Alaska did not oust this Court of its already perfected appellate jurisdiction.

B. The decision below drew into question the validity of Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1958), and the decision was against the validity of

that Section. There was also drawn into question below the validity of a criminal statute of Alaska as applied to appellant—on the grounds of its repugnance to Section 4—and the lower court upheld the State statute as overriding the plain language of an Act of Congress. Appellate jurisdiction therefore lies under both 28 U.S.C. § 1257(1) and 28 U.S.C. § 1257(2).

II.

Under Section 15 of the Act of March 3, 1891 appellant was granted the exclusive right to fish in the waters immediately surrounding the Annette Islands, subject only to Federal regulation. There is apparently no dispute that this state of affairs continued until January 3, 1959.

On January 3, 1959 Alaska was admitted to the Union under the provisions of the Alaska Statehood Act, 72 Stat. 339 (1958), Section 4 of which reserved to the United States continued "absolute jurisdiction and control" over Indian fishing rights in Alaska. Mere examination of the language of Section 4 as well as a study of its legislative history makes clear that it was the intent of Congress to continue the arm of Federal protection over the rights of the Indian communities of Alaska and to prevent the State from interfering with these rights in any way.

In its opinion the court below did not even refer to Section 4 of the Alaska Statehood Act. Nor did appellees attempt to explain it away in their brief in the trial court. The fact that Congress intended to exclude the State from control of Indian fisheries and that it carried out its intention by enacting Section 4 of the Alaska Statehood Act seems to have been conceded.

III.

The thrust of the opinion of the court below seems to be that Congress lacked the power to prevent the State from regulating Indian fisheries. What the court appears to have held is that any attempt to restrict the authority of the State over Indian fisheries violates the doctrine that all States are admitted to the Union "on an equal footing" and is, therefore, unconstitutional.

The court below erred in holding unconstitutional Section 4 of the Alaska Statehood Act. The "equal footing" doctrine prevents the United States from using a Statehood Act as a means of limiting State jurisdiction or extending Federal jurisdiction only in a field in which the Constitution of the United States has not given the Federal Government authority to act. But in dealing with Indian communities, the Constitution grants to Congress, under the "Indian Commerce Clause," Article I, Section 8, Clause 3, "[p]lenary" power to act. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903). Nor has Alaska been singled out for discriminatory treatment. Clauses similar to Section 4 of the Alaska Statehood Act are contained in the Statehood Acts of Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Moreover, this Court has found State jurisdiction not to apply on Indian reservations even in the absence of a specific disclaimer clause. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832).[1] Congress thus clearly had the power to enact Section 4 of the Alaska Statehood Act.

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[1] In *Williams* v. *Lee*, 358 U.S. 217 (1959), this Court decided against State jurisdiction on the authority of *Worcester* v. *Georgia*, *supra*, relegating the disclaimer clause to a mere footnote. *Id.* at 222, n. 10.

ARGUMENT

The history and development of the Metlakatla Indian Community are living proof of how an enterprising people, aided by enlightened Federal policy, can establish a civilized community in a wilderness area, and can progress and prosper. After the Metlakatlans had been invited by the United States to settle in Alaska, they specifically selected the Annette Islands because of their fishing potential. Congress then reserved the area for their benefit.

Always an industrious people, they quickly established a thriving community. Federal protection made it possible for them to obtain substantial economic benefits from their exclusive fishery. Federal loans enabled them to develop their economic potential further and to raise their standard of living. A cannery was established, boats were purchased and, with the help of the Rural Electrification Administration, electricity was brought to the Islands. Profits derived by the community from the operation of its enterprises have been used for general community improvement, including the establishment and maintenance of a health clinic and the development of an adequate water supply and of sanitation facilities.

Having fostered this development of the Metlakatla Indian Community, the Federal Government did not wish, upon the admission of Alaska to statehood, to remove its protective arm. Congress explicitly asserted continued exclusive Federal authority over Indian fishing in Alaska. The basic question in this case is whether Congress had the power to do so. Appellant submits that it did.

I. JURISDICTION

A. The Judgment Below Was Rendered by the Highest Court of the State

Immediately prior to the admission of Alaska to the Union on January 3, 1959, the judicial authority over Alaska was vested in a territorial, legislative court, established by Congress, 48 U.S.C. § 101, pursuant to Article IV, Section 3, paragraph 2 of the United States Constitution. The draftsmen of the new Alaska State Constitution and of the Alaska Statehood Act recognized that on the date of admission there would be no distinct State juridical system in existence. See, *e.g.*, S. Rep. No. 1163, 85th Cong., 1st Sess. 28 (1957). Therefore, both the State Constitution, in Article XV, Sections 4 and 17, and Section 18 of the Alaska Statehood Act provided that the territorial court was to continue to function as before statehood during the interim between the effective date of the Statehood Act and the establishment by the Alaska legislature of the State judicial machinery. The personnel of the old territorial court remained on duty during the interim period. It was during this interim period that this action was instituted and decided below. Further, it was during this interim period that the appeal to this Court was perfected.

On the same day that the opinion below was announced in open court, July 1, 1959, appellant gave oral notice of its intention to appeal (R. 58). On July 11, 1959, on appellant's application, Mr. Justice Brennan granted a stay *pendente lite*. 4 L. Ed. 2d 34 (1959). On August 6, 1959 appellant filed a written notice of appeal to this Court (Tr. 5), and on August 20, 1959, filed its jurisdictional statement.

In analyzing the jurisdiction of the Supreme Court of the United States over this appeal, it is necessary first to determine the character of the court below: Was the lower court a Federal court or a State court?

That the interim court was a State court is not seriously challenged. The court below correctly so held (R. 55), and that holding is in accord with the rationale of *Benner* v. *Porter,* 50 U.S. (9 How.) 235, 242-45 (1850), and subsequent State and Federal cases. See *Ames* v. *Colorado Central Ry.,* 1 Fed. Cas. 750 (No. 324) (C.C.D. Colo. 1876); *Kansas* ex rel. *Hunt* v. *Meadows,* 1 Kan. 90 (1862); *Inerarity* v. *Curtis,* 4 Fla. 175, 179-180 (1851).

It is clear that the interim court was not, after January 3, 1959, a United States District Court. As was observed in *Parker* v. *McCarrey,* 268 F.2d 907, 909 (9th Cir. 1959), no one could reasonably contend that the lower court was the *new* United States District Court for the District of Alaska. That new District Court, provided for in Sections 12-18 of the Alaska Statehood Act, did not come into existence until February 20, 1960, when the President issued Executive Order No. 10867, 25 Fed. Reg. 1584 (1960), under Section 18 of the Statehood Act.

Nor was the court below a territorial court. As this Court held in the leading case of *Benner* v. *Porter, supra,* the admission of a State automatically and instantaneously terminates all aspects of its previous territorial government, including the territorial judicial system. See also *Forsythe* v. *United States,* 50 U.S. (9 How.) 571, 576 (1850); *McNulty* v. *Batty,* 51 U.S. (10 How.) 72, 77-78 (1851).

Granting that the court below was a State court, we now reach the question whether the judgment below was the final judgment of the highest court of Alaska in which a decision could be had, as is required for review by this Court. 28 U.S.C. § 1257.

It is uncontested that the judgment below, dismissing the complaint with prejudice (R. 70), is a final judgment. The issue now, however, is whether the judgment below is the judgment of "the highest court of a State in which a decision could be had." *Ibid.* More specifically, the issue raised by appellees is: At what point in time must the court below be the highest court?

This is admittedly an issue of first impression. Appellant has been unable to find any precedents squarely in point. The question must thus be decided through close examination of the wording of Section 1257 and by analyzing it in its setting, namely the role of this Court in the administration of justice. *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 542-44 (1940). It is respectfully submitted that proper analysis of the wording of Section 1257 and its setting leads to the conclusion that the critical point in time is the date of the judgment.

The relevant text of Section 1257 reads as follows:

> Final judgments . . . rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . .

The juxtaposition of the words "judgment" and "rendered" is significant. It is the "judgment" that must be scrutinized to determine its reviewability. In scrutinizing it, the circumstances under which it was "rendered" must be determined. If it is necessary to determine the circumstances under which a judgment is

"rendered," such determination must be made as of a specific point in time.

A judgment is, of course, "rendered" as of a day certain. If the court rendering the judgment is on such day certain the highest court of a State, then any judgment rendered by it on that day is the judgment rendered by the highest court. Section 1257 does not go on to say that such judgments may be reviewed only if at the time of review the court below is still the highest court.

A case which bears some relation to this question is *Market Street Ry.* v. *Railroad Comm'n of Calif.*, 324 U.S. 548 (1945). There this Court held that a judgment is "final" for purposes of 28 U.S.C. § 1257 "when the issues are adjudged" even though there is "a latent power in the rendering court to reopen or revise its judgment." 324 U.S. at 551. If this latent power can neither disturb the finality of a judgment, nor toll the time to seek review, an appeal to this Court should certainly not be defeated by the creation of a new court after the time for review has started to run.

The practical need for the rule suggested is demonstrated by the facts of this case. The judgment below was rendered on July 2, 1959, and the need for an appellate forum arose at once. Under this Court's rules, in order to seek a stay here appellant was first required to seek a stay in the trial court. See Rules 18(2), 51(2). It did so, and its petition was denied (R. 67). Appellant immediately thereafter sought a stay from this Court, since there was no further judicial authority in Alaska from which a stay could be sought. A stay was granted here by Mr. Justice Brennan on July 11, 1959.

As already indicated, analysis of the wording of Section 1257 results in the conclusion that it is the date of judgment which must be the date as of which the lower court must be the highest court of the State. However, if there were any doubt on this point, there can be only one other critical date: the date of filing of the notice of appeal. It is as of that date that the jurisdiction of this Court is invoked and vests. 28 U.S.C. § 2101; Rule 10(1) of the Rules of this Court. It is self-evident that havoc would be wreaked with our judicial system and, in particular, with the authority of this Court, if the jurisdiction of the Supreme Court of the United States, once having vested, could be defeated through manipulation by a State with either the finality of a judgment or the status of the court below as the highest court in which a decision could be had.

What was said in *Kentucky* v. *Powers*, 201 U.S. 1 (1906), with regard to this Court's power to review inferior State court decisions, applies equally to the principle that the standards of 28 U.S.C. § 1257 cannot remain in limbo but must become fixed as of a day certain:

> This must be so, else it will be in the power of a state to so regulate the jurisdiction of its courts as to prevent this court from protecting rights secured by the Constitution, and improperly denied in a subordinate state court, although specially set up and claimed. 201 U.S. at 37.

In the light of the foregoing analysis of the underlying legal considerations, the following facts are relevant:

1) Article XV, Section 17 of the Constitution of the State of Alaska provides that "[*u*]*ntil the courts pro-*

vided for in Article IV are organized . . . the judicial system shall remain as constituted on the date of admission." (Emphasis added.) See also Section 18, Alaska Statehood Act, 72 Stat. 350 (1958).

2) On July 2, 1959, the date of the judgment below, the only court organized and existing in Alaska was the trial court.

3) On July 11, 1959, Mr. Justice Brennan, in issuing his opinion on the application for a restraining order, observed:

> There is at present no higher court of the State to which petitioners can appeal. . . . 4 L. Ed. 2d at 36.

4) On July 29, 1959, the three justices of the Supreme Court of Alaska were appointed.

5) On August 6, 1959, appellant filed its Notice of Appeal (Tr. 5; R. 1-4).

6) On August 7, 1959, Chief Justice Nesbett and Justice Dimond took their oaths of office. Justice Hodge took his oath of office on September 1, 1959.

7) On September 25, 1959, the Supreme Court of Alaska appointed a clerk and promulgated rules.

8) On October 5, 1959, the Rules of the Supreme Court of Alaska became effective. See Alaska Supreme Court Rule 53.

The specific question to be answered on this state of facts is: When was the Supreme Court of Alaska "organized" so as to displace the interim judicial system? Some relevant comments in leading State cases throw light on this subject. Thus, in *State* v. *Sammons,* 223 Ind. 57, 57 N.E.2d 587 (1944), the Indiana Supreme Court declared:

> A time when, a place where, and the persons by whom, judicial functions are to be exercised, are essential to complete the idea of a court. 57 N.E. 2d at 590.

And in *Thompson* v. *Commonwealth,* 266 Ky. 529, 99 S.W. 2d 705 (1936), the court observed:

> To constitute a lawful court . . . the persons who assume to hold such court and dispense justice must be officially assembled under authority of law and the court must be held at the appropriate time and place approved by law therefor. 99 S.W. 2d at 706.

Article XII, Section 5 of the Constitution of Alaska provides: "All public officers, before entering upon the duties of their offices," shall take an oath of office. Article IV, Section 2 provides that the Alaska Supreme Court "shall consist of three justices." None of these three justices had entered upon his duties by August 6, 1959, when the Notice of Appeal was filed. It was not until September 1, 1959 that all members of the court had qualified.

Moreover, neither the Alaska Constitution nor any statute provided for any time or meeting place of the Supreme Court of Alaska. Article IV, Section 15 of the State Constitution, however, authorized the Supreme Court to make rules governing the administration of the courts. It was Rule 2 of the Rules of the Alaska Supreme Court which first specified the "time when" and the "place where" that court would meet. And it was Rules 7 and 54 which first provided for appeals from the District Court for the State of Alaska.

It is thus respectfully submitted that it was not earlier than September 25, 1959 and more likely on October 5, 1959 that the Supreme Court of Alaska was

"organized" within the meaning of Article XV, Section 17 of the Alaska Constitution. As the critical date for determining the status of the court below is July 2, 1959 and certainly not later than August 6, 1959, it follows that on the critical date the trial court was the highest court of the State in which a decision could be had.

B. The Judgment Below Was Based on a Decision Against the Validity of a Federal Statute and in Favor of the Validity of a State Statute

To complete consideration of the requirements of Section 1257 it must be shown that a Federal statute was drawn in question and that the decision was against its validity. Appellant based its claim on Section 4 of the Alaska Statehood Act (R. 14); the court below in effect declared that section unconstitutional as violative of the "equal footing" doctrine.

In addition, the lower court also upheld application to appellant of criminal laws of Alaska which appellant contended (R. 12, 15) were, under the terms of Section 4 of the Alaska Statehood Act, invalid as applied. Thus, the criminal laws of Alaska, over a challenge of repugnancy to a statute of the United States, were held valid. See 28 U.S.C. § 1257(2); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282, 287-89 (1921).

All elements are present to establish this Court's jurisdiction under Section 1257.

C. Equity Jurisdiction Will Lie to Restrain the Enforcement of the Alaska Anti-Fish Trap Laws Against Appellant

Chapter 17, SLA 1959, as amended, a statute of the State of Alaska, provides that it shall be unlawful "to erect, moor, or maintain fish traps" and makes any

violation "punishable by imprisonment not to exceed one year or by fine not to exceed $5,000.00 or by both such imprisonment and fine." To restrain the enforcement of this criminal statute against itself and its members, appellant brought this action.

The court below rendered its judgment on the merits. The question of equity jurisdiction of that court was raised by appellees (Tr. 171-72) but the court, in proceeding to the merits, evidently decided in favor of its jurisdiction. In doing so, it was on sound legal ground.

As recently as 1949, this Court restated both the applicable legal principles and their specific application to the salmon fishing industry in Alaska. In language as apt in this case as it was there the Court stated:

> If respondents show that they are without an adequate remedy at law and will suffer irreparable injury unless the enforcement of the alleged invalid regulation is restrained, a court of equity will enjoin. While ordinarily criminal prosecutions will not be restrained even under an invalid statute, a civil action will lie in exceptional circumstances that make an injunction necessary to effectually protect property rights.
>
> The facts heretofore detailed as to the investments of respondents in canneries and fishing equipment and their established activities in the waters of the reservation make clear the serious effect on them of exclusion from the reservation. . . . [R]espondents could not operate profitably if prohibited from fishing in the reservation area. Many fishermen may stay away from the grounds for fear of punishment. . . . These [criminal] sanctions deny to respondents an adequate remedy at law. . . . [T]o stay out of the reservation prevents the profitable operation of the canneries. In

> such a situation a majority of this Court thinks that the "danger of irreparable loss is both great and immediate" and properly calls forth the jurisdiction of the court of equity. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, at 98-100 (1949).

This Court also noted that: "Seizure of a fisherman's boat is a drastic sanction." *Id.* at 100, n.16. Surely seizure of a fisherman's trap is no less drastic. See also *Toomer* v. *Witsell*, 334 U.S. 385, 391-92 (1948); *Truax* v. *Raich*, 239 U.S. 33, 38 (1915); *Pacific American Fisheries* v. *Mullaney*, 191 F.2d 137, 141 (9th Cir. 1951).

The evidence in the complaint and affidavits detailing the substantial loss to appellant if trap fishing were outlawed is impressive. The evidence shows clearly that if appellant is deprived of its trap-caught fish, it will become bankrupt and the entire Community will become economically dormant.

The Community-owned cannery's financial statements (R. 17-29) demonstrate that, after elimination of items attributable to fish trap operations:

1) A 1958 net profit of $253,106.38 would have been converted into a net loss of $65,279.88, or an effective total loss to the Metlakatla Community of $318,386.26.

2) Over the seven-year period 1952-1958 an average net profit of $86,148.51 would have been converted into an average net loss of $61,726.04, or an effective average annual loss to appellant of $147,874.55.

In addition, the Community is dependent upon cannery operations as the only source of income from which it can repay the following debts:

1) $1,578,781.59 to the Rural Electrification Administration, carrying annual installments of about $60,000 (R. 31).

2) $210,000 to the Bureau of Indian Affairs, carrying annual installments of $25,000 (R. 31).

Henry S. Littlefield, the elected Mayor of the Metlakatla Indian Community, summarized the plight of appellant in the following language:

> That the economic welfare and prosperity of the community is entirely dependent upon the successful operation of its salmon cannery; that without the use of its fish traps the cannery cannot be operated profitably; that the community has incurred an indebtedness to the United States in approximately the sum of two million dollars; that such indebtedness consists of loans for the construction and operation of a hydro-electric system and boat loans for the members of the reservation; that in order to secure said loans it was necessary to assure the federal government that the loans could be repaid from the operation of its salmon cannery; that the profits from the said cannery have been pledged to the United States as security for the payment of said loans; that without the operation of said fish traps the loans cannot be repaid which will result in economic disaster to the inhabitants and a loss to the federal government. (R. 37.)

A member of the Tribal Council put the problem in these words:

> Without the operation of these traps, our primary source of income, the life blood of our community will stop flowing. It would become, literally, a community ghost town. Without traps, we would become absolutely dependent as a community and as individuals upon the State of Alaska, or the United States of America. Most of our people

would go on welfare, and we would become wards of the government in the literal sense of the word.

We usually have about twenty men engaged in pre-season work on traps alone with an average annual payroll of approximately $30,000.00. The payroll for pre-season work done on the cannery proper amounts to approximately another $30,000.00 annually. The labor performed in the cannery by residents of our community, during the actual season itself, is in excess of $100,000.00. Most of this money is made by female members of the community, and it goes toward the acquisition of clothing and food, etc., for the winter months. If these people did not have a chance to make these wages in the cannery, it is safe to state that there is no place else that they could make it.

From my many years of experience with town affairs and from my intimate knowledge of the cannery operation, I can safely state that without the trap-caught production, we would be forced to curtail the cannery operation in its entirety. Without the operation of the cannery, and the wealth it creates for our community, our people would seriously suffer, to such an extent that we would be little more than an isolated native village, living on a dole, and without hope for the future. Our present achievements and desirable standard of living would go by the board and our model community, as it exists today, would be a thing of the past. (R. 32.)

It is respectfully submitted that from the foregoing evidence it must be concluded that the " 'danger of irreparable harm is both great and immediate' and properly calls forth the jurisdiction of the court of equity." *Hynes* v. *Grimes Packing Co., supra,* 337 U.S. at 100. As Mr. Justice Brennan put it in the opinion granting the stay:

I think the equities so plainly support the petitioners' application that it should be granted. The restraining order is sought by the petitioners upon allegations that the State of Alaska and its Governor, unless restrained, will treat the authorization by the Secretary of Interior of trap fishing by the petitioners as a nullity and enforce the State's criminal statute to prevent the petitioners' use of the authorized traps, resulting in substantial financial loss for 1959 fishing and cannery operations, and in turn causing irreparable injury to the economy and welfare of the Indian communities. . . . [T]he State and the Governor have made no showing which persuades me that the consequences feared by petitioners will not follow from enforcement of the state statute against the petitioners. The Solicitor General advised that it is the opinion of the Interior Department that the petitioners will be injured by its enforcement against them. And, whereas petitioners will suffer substantial and irreparable injury affecting three entire Indian communities if they are not permitted to engage in trap fishing as authorized by the Secretary for the current fishing season, for all that appears the injury to the State from a temporary restraining order will be slight, or at most will be of insufficient consequence to justify denying the petitioners a restraint against enforcement of a statute as to which there are serious doubts whether it may be validly applied to the petitioners. 4 L. Ed. 2d at 40.

II. THE MERITS

A. Under Section 15 of the Act of March 3, 1891 Appellant Was Granted the Exclusive Right to Fish in the Waters of the Annette Islands, Subject Only to Federal Regulation

The rights which appellant here seeks to protect are derived from Section 15 of the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358, which provides:

> Until otherwise provided by law the body of lands known as Annette Islands . . . is set apart as a reservation for the use of the Metlakahtla Indians . . . to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

The foregoing statutory language has been construed by this Court as giving to appellant an exclusive right not only to the upland of the Annette Islands but to the adjacent waters and submerged land as well. In *Alaska Pacific Fisheries* v. *United States, supra,* this Court declared in a unanimous opinion by Mr. Justice Van Devanter:

> The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. . . . Evidently Congress intended to conform its action to their situation and needs. It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands. This, as we think, shows that the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland,—in other words, as descriptive of the area comprising the islands. *Id.* at 89.

On the basis of this conclusion, the Court granted an injunction compelling Alaska Pacific Fisheries to withdraw from the waters of the Annette Islands.

While the Court found sufficient authority in the 1891 Act to declare the waters surrounding the Annette Islands to be part of the reservation—and therefore that the United States could secure to the Metlakatlans the exclusive fishing right in reservation waters—the Executive Branch had nonetheless moved to provide an exact definition of the geographic boundaries of the reservation area contained in the 1891 statutory grant. On April 28, 1916, President Wilson had issued a proclamation which declared that:

> [T]he waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets . . . also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakatlans . . . to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce. 39 Stat. 1777.

In *Hynes* v. *Grimes Packing Co., supra,* this Court acknowledged the vitality of the *Alaska Pacific* holding that the Indians' statutory reservation extended to the offshore waters as well as to the upland. In discussing the relation of President Wilson's 1916 Proclamation and the 1891 Act, as set forth in the *Alaska Pacific* case, this Court stated in *Hynes* v. *Grimes Packing Co., supra,* 337 U.S. at 113-114:

> This Court affirmed the decree as to the waters within 3,000 feet of the shore lines. Although in the brief a vigorous attack was made on the power to issue the proclamation covering the waters, the proclamation was not referred to in the unanimous opinion here. *This Court felt compelled to decide the fisheries were included in the language of the*

> *statute* by the purpose to assist the Indians to train themselves. Fishing was said to give value to the islands. "The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location." *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89. (Emphasis added.)

Thus, as late as 1949, this Court had confirmed appellant's right to exclusive use of the Annette Islands and their adjacent waters, subject to regulation only by the United States. As we shall show, that right has never been abrogated or curtailed by any action of the Congress of the United States. The exclusive power to regulate fishing in those waters has never been surrendered by the Federal Government. And the Alaska Statehood Act specifically reserved to the United States the "absolute jurisdiction and control" of appellant's fishing rights. In addition, the Executive Branch has in the past[2] and continues in the present[3] to assert Federal jurisdiction over the waters of the Annette Islands.

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[2] Article I of the Constitution of the Metlakatla Indian Community, approved by Assistant Secretary of the Interior Oscar L. Chapman on August 23, 1944, pursuant to the Act of May 1, 1936, 49 Stat. 1250, 25 U.S.C. § 473a, reaffirmed the Community's rights:

> The Metlakatla Indian Community shall for all purposes of this Constitution exercise jurisdiction over all the territory and waters described in the aforesaid Act of March 3, 1891, and the Presidential Proclamation of April 28, 1916, and such other lands and waters as may in the future be acquired by or reserved for the Community.

[3] See Letter from Under Secretary of the Interior Elmer F. Bennett to Alaska Area Director, Bureau of Indian Affairs, dated March 10, 1959, where Mr. Bennett, after referring to Alaska's disclaimer in Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1958), stated:

> This disclaimer, coupled with the longstanding supervisory control exercised for the protection of the interests of Indians,

B. The Rights Granted Appellant Under the Act of March 3, 1891 Were Explicitly Preserved by Section 4 of the Alaska Statehood Act

(1) *Section 4 of the Alaska Statehood Act was designed to protect appellant's rights.*

As indicated by the foregoing, the right to hold and use the Annette Islands was granted to the Metlakatlans, subject only to the power of the United States to regulate and restrict that right. This power to regulate and restrict has indeed been exercised by the United States in the field of immediate concern in this law suit, that of fishing. For many decades, the United States has in the interest of conservation, imposed limitations on the free exercise of the Metlakatla Indian Community of its right to fish. However, until 1959 it had not been disputed that, to the extent to which the Federal Government authorized fishing by the Metlakatlans within their reservation, such fishing was legal and not subject to any other restrictions.

Proceeding on the assumption that the legal rights and relationships as established by the Act of March 3, 1891 had not been altered by any subsequent legislation, see note 3, *supra,* the Secretary of the Interior in 1959 promulgated Alaska fishing regulations which permitted, *inter alia,* the operation of four fish traps within the Metlakatla Reservation during the 1959 fishing season. 24 Fed. Reg. 2053 (1959). The Secretary has announced that he intends to do the same with regard to the 1960 season and thereafter. See Appendix C, *infra* at 51.

Eskimos and Aleuts by the Department of the Interior, accounts for the provision that the proposed regulations will not eliminate operation of the fish traps by Indian tribes or villages. *The Secretary will continue to control the operation of traps by Indian tribes and villages.* (R. 18.) (Emphasis added.)

Against this action of the Secretary of the Interior in 1959 and the proposed action in 1960, the State of Alaska asserts the power to prohibit what the Secretary has permitted and what the United States has supported with financial and technical aid (R. 31, 34, 37). Having outlawed fish traps elsewhere in the State, the State contends that it may do the same on the Metlakatla Reservation and that the 1959 regulations (and presumably the 1960 regulations as well) of the Secretary of the Interior permitting the operation of four traps are null and void (R. 40).

While the decision below, having been announced from the bench because of the urgency of the matter, is not wholly clear in its analysis of the legal issues, it is evident that the court below felt that admission to Statehood clothed Alaska with the power to regulate fishing on the Metlakatla Reservation. The lower court seems to have decided that the Statehood Act, by implication, repealed the Act of March 3, 1891, under which appellant obtained a use right subject only to Federal regulation.

It is an established canon of statutory construction that an earlier specific statute shall not be construed as having been repealed by implication by a later general statute. Ex parte *Crow Dog,* 109 U.S. 556, 570-71 (1883). Thus, even if there had been no reference at all to Indian fishing rights in the Statehood Act, the Act of March 3, 1891 would have to be construed as continuing to accord exclusive regulatory power on the Metlakatla Reservation to the Federal Government.

But the fact is that Indian rights, including fishing rights, were most carefully considered in the drafting of the Statehood Act. Those fishing rights were specifically preserved as subject to the "absolute jurisdic-

tion and control" of the United States, until such jurisdiction is explicitly surrendered by Congress. Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1958) provides:

> As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title . . . to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe . . . .

The new State's consent to this compact appears in Article XII, Section 12 of its Constitution.[4] That Section, which is virtually identical to the disclaimer language in Section 4 of the Statehood Act, recites:

> The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community

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[4] It should be noted that Alaska was admitted to the Union under the so-called "Tennessee Plan." Under this Plan, the Territory by Convention prepared a Constitution and then petitioned Congress for admission. The alternative to the "Tennessee Plan" requires that Congress first pass an enabling act, setting forth the conditions of admission. Upon compliance by the proposed new state, Congress would then be asked to pass an admitting act. Until 1955, Alaska unsuccessfully sought enabling legislation from Congress. In 1956 Alaska adopted a Constitution for the proposed new State and proceeded thereafter, successfully, under the "Tennessee Plan" to secure admission.

> thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States.

The meaning of the disclaimer language of Section 4 as it applies to appellant's fishing rights is plain. In that Section Congress confirmed Alaska's disclaimer of all interest in Indian fishing rights and reserved to the United States "absolute jurisdiction and control" over those rights. The clarity of the disclaimer language of Section 4 should make unnecessary any examination of the legislative history. *United States* v. *Missouri Pac. R. R.*, 278 U.S. 269, 277-78 (1928).

If the legislative history of a decade of Alaska Statehood bills is examined, however, it merely reinforces what is readily apparent in the language of Section 4: control over Indian fishing was to remain solely in the United States.

The first Alaska Statehood bill to be reported out of a Congressional Committee was H.R. 5666 of the 80th Congress. That bill embodied a proposal which had been submitted by the Department of the Interior, see *Hearings Before the Subcommittee on Territorial and Insular Possessions of the House Committee on Public Lands*, 80th Cong., 1st Sess. 14 (1947), setting the following requirement for the proposed Alaska Constitution:

> Said convention shall provide, by ordinance, irrevocable without the consent of the United States and the people of said State.
>
> . . .

> Second. That said State and its people do agree and declare that they forever disclaim all right and title to . . . all lands lying within its boundaries owned or held by any Indian, Aleut, or Eskimo, hereinafter called native, or by any native tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of the United States or of such native or native tribes shall have been disposed of or extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States . . . .

It is to be noted that this early version of the disclaimer clause did not contain the parenthetical phrase "(including fishing rights)" now found in Section 4 of the Statehood Act. But even without the parenthetical phrase, the Committee's report made clear that Congress alone was to exercise control over appellant's fishing rights after statehood. The report stated:

> The basic intent of paragraph Second, Section 3, insofar as it deals with matters affecting the Indians, Aleuts, and Eskimos, is *to protect the natives of Alaska against the possibility of infringement of their property rights by the proposed new state, and to maintain unimpaired the authority of the Congress over the use and disposition of native property in Alaska.* Provisions to this effect are a customary feature of enabling acts admitting new States to the Union. As proposed to be amended this paragraph would preserve all existing valid native property rights in Alaska, including those derived from use or occupancy, together with all existing authority of the Congress to provide for the determination, perfection, or relinquishment of native property rights in Alaska. It would neither add to nor subtract from such rights and such authority, but would simply maintain the status quo.

> *Under the provisions of this paragraph,* with the recommended amendments, *none of the native groups,* as well as none of the native persons, *would lose any legal or equitable rights which they may now have to any lands or waters within Alaska.* This would be true irrespective of whether the group concerned holds a constitutional charter issued by the Federal Government or is organized in some other manner, and irrespective of whether the group is denominated a "village" or "community" or is called by some other name. In addition, all existing laws authorizing the establishment of reservations, or otherwise providing for the utilization by the natives of public lands or waters in Alaska would continue in effect until amended or repealed by the Congress. H.R. Rep. No. 1731, 80th Cong., 2d Sess. 31 (1948). (Emphasis added.)

H.R. 5666 failed of enactment. The Alaska Statehood drive was, however, resumed in the 81st Congress with the introduction of H.R. 331. Section 3, paragraph Second of the new Statehood Bill was identical to the language of that paragraph in H.R. 5666 of the 80th Congress. And the report of the House Committee on Public Lands, which quickly reported it out, was likewise identical to the language of the report in the previous Congress. See H.R. Rep. No. 255, 81st Cong., 1st Sess. 13 (1949). H.R. 331 passed the House on March 3, 1950, 96 Cong. Rec. 2744-81 (1950), and was subsequently referred to the Senate Committee on Interior and Insular Affairs.

It was during the Senate Interior Committee's consideration of Alaska Statehood in the 81st Congress that the phrase "(including fishing rights)" was added to the disclaimer clause. In describing the essentials

of the proposed State Constitution, the Committee noted:

> It is also provided that in the proposed constitution the new State and its people disclaim all right and title, not only to lands or other property of the United States, which is not conveyed or confirmed to the State or its political subdivisions, but also "to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives), or is held by the United States in trust for said natives."
>
> . . .
>
> The right of the Federal Government to legislate with respect to natives is not impaired by the bill and cannot be impaired by the State Constitution. S. Rep. No. 1929, 81st Cong., 2d Sess. 1-2 (1950).

Later in the same report the Committee left no doubt that it meant to withhold from Alaska any power over native fishing. The Committee stated:

> The new State would have the same control over the invaluable fisheries and wildlife within its borders as do other States of the Union, *subject only to the limitations of* international agreements, such as that affecting seals and *native rights to fish and wildlife. Id.* at 11. (Emphasis added.)

The Senate, however, failed to act on the bill.

Thus, by the close of the 81st Congress in 1950 the language of the disclaimer clause had crystallized in every detail important to this suit to the language later embodied in the Statehood Act. And, as the comments of the various Committees make clear, the thrust of the disclaimer was "to protect the natives of Alaska against the possibility of infringement of their prop-

erty rights by the proposed new State, and to maintain unimpaired the authority of Congress over the use and disposition of native property in Alaska." H. R. Rep. No. 255, 81st Cong., 1st Sess. 13 (1949).

In the 82d, 83d, and 84th Congresses, all of the Statehood bills which received serious consideration retained the disclaimer language—or substantially similar language—as ultimately became law as Section 4 of the Statehood Act. See 82d Cong.—S.50; 83d Cong.—S.50; H.R. 2982; 84th Cong.—H.R. 2535.

It was the 85th Congress which finally passed the Alaska Statehood Act. The disclaimer clause was now in Section 4. It was enacted into law in the same form in which it had been reported out of the House Committee on Interior and Insular Affairs. In commenting on the disclaimer, the House Committee stated:

> Section 4 provides that the State of Alaska and its people forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Admission Act, the right or title to which is held by the United States or is subject to disposition of the United States. This disclaimer likewise applies to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts, or is held by the United States in trust for them. The section also provides that except for property held by Indians, Aleuts or Eskimos in fee without restrictions on alienation, it would be under the jurisdiction and control of the United States . . . . H.R. Rep. No. 624, 85th Cong., 1st Sess. 19 (1957).

When the bill reached the Senate, a question was raised as to the rather sweeping language of Section 4, which provided that native lands and property shall remain "under the absolute jurisdiction and control of the United States." The Senate Committee on Interior and Insular Affairs pointed out that " 'absolute jurisdiction' is a term of art describing a status of authority which is not presently exercised by the United States over Indian lands within the United States." S. Rep. No. 1163, 85th Cong., 1st Sess. 15 (1957). It proposed that Section 4 provide merely for the retention of "absolute control" by the United States. What the Committee evidently had in mind was that the United States does not have civil and criminal jurisdiction over non-Indians on Indian lands, hence its jurisdiction could not be "absolute." *United States* v. *McBratney,* 104 U.S. 621 (1882).[5] Of the basic objective of the Section, the Senate Committee strongly approved, pointing out that it was "to protect the rights of the native inhabitants." S. Rep. No. 1163, 85th Cong., 1st Sess. 15 (1957).

This fine technical point of the Senate Committee was ultimately ignored. The Senate went on to enact

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[5] The statute under which Alaska acquired criminal jurisdiction over the Indian country, 18 U.S.C. § 1162(a), serves only to strengthen appellant's contention. Even apart from the limitations on the exercise of that jurisdiction contained in Article XII, Section 12 of the Alaska Constitution, the very words of Section 1162 forbid the type of action attempted by the State against appellant. Subsection (b) of Section 1162 states:

> Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

the entire House bill, including its provision to retain "absolute jurisdiction and control" in the United States. This sweeping language most certainly encompasses the rights derived by the Metlakatla Indian Community from Section 15 of the Act of March 3, 1891.[6]

If there remained any doubt about the meaning of the State's disclaimer of jurisdiction over appellant's right to fish as embodied in Section 4, the Alaska Omnibus Act of 1959, 73 Stat. 141, laid those doubts to rest. The Omnibus Act, passed after Statehood was achieved, was an Administration measure "designed to eliminate some of the problems which exist in the transfer from the territorial status of Alaska to that of the 49th State." *Hearings before the Senate Committee on Interior and Insular Affairs,* 86th Cong., 1st Sess. 1 (1959). Section 2 of the Omnibus Act amended the language of Section 4 of the Statehood Act. The amendment is set forth in the Committee reports under "Changes in Existing Law" as follows:

> . . . that [all such lands or other property, belonging to the United States or which may belong to said natives] *all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives,* shall be and remain under the absolute jurisdiction and control of the United States . . . . S. Rep. No. 331,

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[6] The Department of Justice had suggested that Congress strike the parenthetical phrase "(including fishing rights)" from the bill, lest it be construed an admission that they are compensable rights. H.R. Rep. No. 624, 85th Cong., 1st Sess. 31 (1957); S. Rep. No. 1163, 85th Cong., 1st Sess. 47 (1957). Congress did not accept this suggestion.

86th Cong., 1st Sess. 30 (1959); H.R. Rep. No. 369, 86th Cong., 1st Sess. 38 (1959).

The Court's attention is directed to the fact that the parenthetical phrase "(including fishing rights)" was now inserted a second time in the disclaimer clause.

The amendment is best described in the transmittal letter of the Director of the Bureau of the Budget:

> Section 2 would amend section 4 of the Statehood Act. Section 4 now provides, in pertinent part, that Alaska and its people disclaim any right (a) to any lands in Alaska the right or title to which is now held by the United States, except for land granted to Alaska by the Statehood Act, and (b) to land and property held by Alaska natives or held in trust by the United States for such natives. The section further provides that "all such lands . . . shall be and remain under the absolute jurisdiction and control of the United States." It was intended that such absolute jurisdiction would apply to native lands only ((b) above), but the language actually enacted appears to comprehend the lands described in both (a) and (b). The amendment would make clear that "the absolute jurisdiction and control of the United States" does not apply generally to land held by the United States in Alaska, but only to land and property held by natives or by the United States in trust for natives.

The foregoing comment is reproduced verbatim as the comment of both the Senate and House Interior Committees. S. Rep. No. 331, 86th Cong., 1st Sess. 9 (1959); H.R. Rep. No. 369, 86th Cong., 1st Sess. 6 (1959).

As signed by the President on June 25, 1959, the amendment to Section 4 of the Statehood Act reemphasized that appellant's fishing rights were and were

to remain the special concern of the Federal Government and of the Federal Government alone.[7]

(2) *Section 4 of the Alaska Statehood Act is constitutional.*

Though appellant set forth the text of Section 4 of the Statehood Act in full in its complaint (R. 8) and relied heavily on it in its brief in the court below, the trial court failed to refer to that crucial section anywhere in its opinion. While sweeping Section 4 under the rug, the court declared with reference to the Metlakatla Reservation: "The federal government retained jurisdiction thereof until Alaska became a state but upon achieving statehood, dominion and sovereignty thereof passed to the new state, subject only to the authority of the federal government in regulating navigation and commerce." (R. 63.) For this proposition, the court relied on *Pollard* v. *Hagan,* 44 U.S. (3 How.) 212 (1845).

Pollard v. *Hagan* holds that a clause in a Statehood act which prevents a state from entering the Union on an "equal footing" with the other states is unconstitutional. Relying on this case the court below, in this indirect and rather clouded manner, ruled in effect that Section 4 of the Alaska Statehood Act is unconstitutional. As has already been shown, the effect of Section 4 with regard to the Metlakatla Indian Community is to preserve the rights established by the Act of

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[7] In the light of Section 4, of the Alaska Statehood Act, *Ward* v. *Race Horse,* 163 U.S. 504 (1896), and *New York* ex rel. *Kennedy* v. *Becker,* 241 U.S. 556 (1916), can have no bearing on this litigation. Besides, it has been suggested that the *Race Horse* case was repudiated by this Court in *Seufert Bros. Co.* v. *United States,* 249 U.S. 194 (1919). See *State* v. *Arthur,* 74 Ida. 251, 261 P.2d 135, 139 (1953), *cert. denied,* 347 U.S. 937 (1954).

March 3, 1891 without any change whatever. The question, therefore, is whether that result is violative of the Constitution of the United States.

The *Pollard* case decided, in its essence, that if a certain power may not be exercised constitutionally by the United States in one of the original States, it may not be exercised by the United States in a new State, even if provision is made in the Statehood Act or by compact that such power be reserved to the United States. As this Court phrased the principle:

> [I]f an express stipulation had been inserted in the agreement [to admit Alabama as a state], granting the municipal right of sovereignty, and eminent domain to the United States, such stipulation would have been void and inoperative; because, the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, *except in the cases in which it is expressly granted. Id.* at 223. (Emphasis added.)

In *Coyle* v. *Smith,* 221 U.S. 559 (1911), this Court expounded further on this proposition :

> In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the state; second, between compacts or affirmative legislation intended to operate *in futuro,* which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power. *Id.* at 568.

As an example of cases falling into the second class, the Court pointed out:

> [S]tipulations . . . in respect to the control of the United States of the large Indian reservations and Indian population of the new state, are found in the Oklahoma enabling acts. Whatever force such provisions have after the admission of the state may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the state. *Id.* at 570.

Thus the Federal power here asserted to exclude the State of Alaska from the regulation of Indian fishing within the Metlakatla Reservation must rest on a grant of authority in the Constitution of the United States. Such a grant of authority plainly exists. Article I, Section 8, Clause 3, of the Constitution of the United States recites:

> The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

This Congressional power has been described as "[p]lenary," *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, at 565 (1903), and as "paramount and of a most sweeping character." *People* ex rel. *Ray* v. *Martin,* 294 N.Y. 61, 60 N.E.2d 541, 545 (1945), *aff'd,* 326 U.S. 496 (1946). It has been recognized as a limitation of the rights of states to apply their criminal laws in the Indian country in a long line of cases from *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), to *Williams* v. *Lee,* 358 U.S. 217 (1959). As this Court said in the latter case:

> [W]hen Congress has wished the States to exercise . . . power [over Indians] it has expressly granted

them the jurisdiction which *Worcester* v. *Georgia* had denied. *Id.* at 221.

The disclaimer provisions of Section 4 of the Alaska Statehood Act are by no means novel. They are patterned after similar provisions included in the Statehood Acts for States containing a substantial Indian population, admitted to the Union since 1889. Typical is the disclaimer provision in Section 4 of the Act admitting Montana, North Dakota, South Dakota and Washington, 25 Stat. 676, 677 (1889), which declares:

> And said [state constitutional] conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of the said States:
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> . . .
>
> Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, *the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .* (Emphasis added.)

See also Statehood Acts for Utah, 28 Stat. 107, 108 (1894), Oklahoma, 34 Stat. 267, 270 (1906), New Mexico and Arizona, 36 Stat. 557, 558-59, 569-70 (1910).

The Arizona disclaimer provision was most recently referred to by this Court in *Williams* v. *Lee, supra,* 358 U.S. at 222, n.10 (1959). Other disclaimer provisions have been uniformly construed as excluding the

authority of the State from the area specified unless and until Congress authorizes the State to enter. See *e.g., Whyte* v. *District Court,* 346 P.2d 1012 (Colo. Sup. Ct. en banc, 1959); In re *Pine's Petition,* 99 N.W.2d 38 (S. Dak. 1959); *Application of Denetclaw,* 83 Ariz. 299, 320 P.2d 697 (1958); *State* v. *Begay,* 63 N.M. 409, 320 P.2d 1017 (1958).

In his opinion accompanying the granting of the stay, Mr. Justice Brennan spoke of "the long-standing policy of federal protection of Indian rights." 4 L. Ed. 2d at 38. As has been shown this policy has often required the exclusion of State jurisdiction from Indian reservation areas. Thus the exclusion of the States of Alaska from the regulation of fishing and the assertion of exclusive Federal authority is by no means novel; it has been traditionally upheld by the courts, including this Court, and is clearly authorized under the Indian Commerce Clause. It follows that Congress had the power to enact Section 4 of the Alaska Statehood Act.

C. The Rights Granted by the Act of March 3, 1891 and Preserved by Section 4 of the Alaska Statehood Act Have Not Been Repealed or Modified by Any Other Statute or Subsequent Legal Development

As has now been demonstrated, the right of appellant to fish subject only to Federal regulation was granted under the Act of March 3, 1891 and was preserved by Section 4 of the Alaska Statehood Act. Appellant submits that no other legal considerations are relevant to a determination of the issues in this case. However, as the court below has referred to certain other factors, it is appropriate to discuss them briefly.

To be sure, these other factors were not clearly articulated by the court below. Nevertheless, in examin-

ing its opinion, the following additional points can be identified: (1) the powers of the State of Alaska are enhanced by the Submerged Lands Act, 67 Stat. 30 (1953), 43 U.S.C. §§ 1311-15; (2) there is no property right in fish traps; (3) fish traps have depleted the salmon runs and have, therefore, been opposed by the people of Alaska. These points will now be discussed seriatim.

In its opinion the lower court declared:

> The new State of Alaska is entitled to such powers as have been given to all states by the Submerged Lands Act. (R. 62.)

Great emphasis was also placed on the Submerged Lands Act in appellees' brief below (Tr. 131, 137-38). Yet nowhere in the opinion or in appellees' brief has there been even an effort to explain how the Submerged Lands Act can have any application to this case in the light of Section 5(b) of that Act, 43 U.S.C. § 1313(b), which provides:

> There is excepted from the operation of section 1311 of this title—
>
> . . .
>
> (b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band or group of Indians or for individual Indians.

The statutory language could not be plainer nor state more concisely that excepted from the affirmative grant of the Submerged Lands Act were the Metlakatla Reservation waters surrounding the Annette Islands.

Nor has the contention that there is no property right in fish traps anything to do with this litigation. Ap-

pellant does not claim a property right in any particular gear. *Cf. Klamath & Modoc Tribes* v. *Maison,* 139 F. Supp. 634 (D. Ore. 1956). It claims an exclusive right to fish, subject to Federal regulation, *but free from regulation by the State of Alaska.* If the State could regulate the fishing gear, it could also regulate the length of the season, and could, in fact, shut down the Metlakatla fishery entirely. See *State* v. *Arthur,* 74 Ida. 251, 261 P. 2d 135 (1953), *cert. denied,* 347 U.S. 937 (1954). That is exactly what Section 4 of the Alaska Statehood Act was designed to prevent.

Similarly, the trial court's seven findings of fact (R. 60-61) have no bearing on this case. They are concerned with policy considerations which are the affairs of Congress, not the judiciary. However, as the trial court has referred to these policy problems, and as appellant is here seeking relief in equity, it would be appropriate to set the record straight.

The fact is that the fish traps here in issue have no appreciable impact on the fish economy of the State of Alaska, as can be seen from the following tabulation:

Year	Alaska Salmon Pack[1] Total	Metlakatla Trap Caught[2] Salmon Pack	Percent (%)
	(Standard 48-pound cases)		
1952	3,574,128	19,327	.54
1953	2,925,570	10,051	.34
1954	3,207,154	22,390	.7
1955	2,457,969	5,793	.23
1956	2,950,354	13,845	.47
1957	2,441,894	8,308	.34
1958	2,984,371	25,763	.8

[1] Pacific Fisherman Yearbook, p. 94 (Jan. 25, 1959).
[2] R. 33.

It should also be noted that the Secretary of the Interior has nonetheless taken account of the seasonal fluctuations in salmon runs in safeguarding the broad public interest in sound conservation practices in Alaska. Of the 21 trap sites authorized for appellant Metlakatla, and for appellants in No. 327, Kake and Angoon,[8] the Secretary has in the past five years permitted operations of traps only as follows:[9]

Year	Metlakatla	Kake	Angoon	Total
1954	4	3	2	9
1955	3	3	2	8
1956	4	3	2	9
1957	3	3	2	8
1958	4	4	3	11
1959	4	4	3	11

It is not conservation that is here at issue. If anything, fishing by traps, which tends to result in fewer damaged fish than fishing with other gear, is preferable from a conservation point of view.[10] The true reason for the effort to suppress the fish traps is that it is a relatively inexpensive method of fishing. Through the use of fish traps, the Metlakatla Indian Community

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[8] Metlakatla has 8 authorized trap sites; Kake has 9; and Angoon has 4. 24 Fed. Reg. 2054 (1959).

[9] See Appendix A, *infra*, at 49.

[10] Report of Secretary of the Interior Douglas McKay on H.R. 242, 84th Cong., dated Oct. 7, 1955, Appendix B, *infra* at 50.

> Various arguments have been urged in favor of eliminating the traps, not all of which have equal validity. For example, it is sometimes argued that the traps should be abolished as a conservation measure. Years of experience give no support of this argument. The basic conservation problem is one of permitting escapement of sufficient salmon to maintain the runs in succeeding years. That can be done as easily through regulating the traps as through regulating other types of gear.

has indeed been able to prosper. Profits of the cannery have been expended on community improvement projects, which have made the Annette Islands a self-supporting community in the new State.[11] Surely, the State will not gain from this effort to remove the economic underpinning of this Indian community. And the Federal Government has a rightful concern to prevent such unwise action by the State, has the power to prevent it, and has most certainly exercised that power.

CONCLUSION

For the reasons set forth herein, this Court should note jurisdiction and reverse the judgment below.

Respectfully submitted,

RICHARD SCHIFTER
THEODORE H. LITTLE

Of Counsel: *Attorneys for Appellant*

DANIEL M. SINGER
Strasser, Spiegelberg, Fried,
Frank & Kampelman

Dated: April 11, 960.

---

[11] *Village of Kake* v. *Egan*, 4 L.Ed.2d 34, at 35 (per Mr. Justice Brennan, Circuit Justice):

> The Indian members of this reservation with the financial support of the Federal Government have been engaged in trapping and canning operations since 1915, and such activity provides the only means of support for substantially all of the inhabitants of the reservation. The Metlakatla Indian Community is obligated to make specific payments to the United States each year in repayment for facilities and equipment bought for its use by the Government. It relies on earnings from its fishing and canning operations to make these payments.

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
BUREAU OF COMMERCIAL FISHERIES
WASHINGTON 25, D. C.

April 6, 1960

Mr. Daniel M. Singer
1700 K Street, Northwest
Washington 6, D. C.

Dear Mr. Singer:

This is in response to your request by telephone on April 5 for information concerning traps operated by native communities in Alaska. The number of traps operated by each of the three native groups were as follows for the years 1954 to 1959:

	1954	1955	1956	1957	1958	1959
Kake	3	3	3	3	4	4
Angoon	2	2	2	2	3	3
Annette Island	4	3	4	3	4	4
TOTAL	9	8	9	8	11	11

Sincerely yours,

JOHN I. HODGES
John I. Hodges, *Chief*
Branch of Resource Management

APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

Copy October 7, 1955

My dear Mr. Bonner:

Your Committee has requested a report on H. R. 242, a bill "To provide for the gradual elimination of Salmon traps in the waters of Alaska."

* * * * * * * * *

For many years traps have been one of the chief methods of catching salmon in Alaskan waters. In recent years the proportion of the Alaska salmon catch taken with traps has been declining, largely because of the closing, through regulatory action or voluntary agreement, of some of the trap sites in order to permit a larger escapement.

Various arguments have been urged in favor of eliminating the traps, not all of which have equal validity. For example, it is sometimes argued that the traps should be abolished as a conservation measure. Years of experience give no support to this argument. The basic conservation problem is one of permitting escapement of sufficient salmon to maintain the runs in succeeding years. That can be done as easily through regulating the traps as through regulating other types of gear.

It is the economic arguments in favor of abolishing the traps which are decisive. Traps are a form of fishing equipment which require capital outlays beyond the capacity of most individual fishermen to finance. Salmon are also caught in Alaska with purse seines, beach seines, gill nets, troll lines, and other types of gear. These are commonly owned by individual fishermen conducting small-scale operations.

A shift in the industry from trap fishing to fishing with less expensive types of gear may therefore be expected to strengthen the competitive position of the individual fisherman or small-scale operator. With a limited resource to develop, it seems right that opportunities to participate in it should be distributed as widely as possible.

* * * * * * * * *

Sincerely yours,

s/ DOUGLAS MCKAY
Secretary of the Interior

Hon. Herbert C. Bonner
Chairman, Committee on
Merchant Marine and Fisheries
House of Representatives
Washington 25, D. C.

APPENDIX C

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON

[25 CFR Part 88]

INDIAN FISHING REGULATIONS IN ALASKA

Notice is hereby given that pursuant to the obligation imposed upon, and the authority vested in, the Secretary of the Interior by Section 2 and 9 of Title 25, and Section 485 of Title 5, U.S. Code, and Section 4 of the Act of July 7, 1958, 72 Stat. 339 amended, 73 Stat. 141, it is proposed to amend 25 CFR by adding a new part 88 as set forth below. The purpose of these amendments is to protect certain fishing rights which have long been recognized; which derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq., other

Federal statutes, regulations and custom; and which were secured to the Alaska Eskimos, Indians and Aleuts by Section 4 of the Alaska Statehood Act of July 7, 1958.

It is the policy of the Department of the Interior whenever practicable, to afford the public an opportunity to participate in the rule making process. Accordingly, interested persons may submit written comments, suggestions or objections with respect to the proposed amendments, to the Commissioner, Bureau of Indian Affairs, Washington 25, D. C., within 30 days after the date of publication of this notice in the Federal Register.

Part 88, reading as follows, is added to 25 CFR, Subchapter H:

§ 88.1 *Scope.* These regulations implement section 4 of the Act of July 7, 1958, 72 Stat. 339, as amended, by declaring existing fishing rights of Indians in Alaska and providing for the protection and control thereof. Provisions for those rights derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq., and the limitations and sanctions necessary to preserve such rights are included herein. These regulations are permissive, but shall not be construed as a limitation upon any native rights not mentioned in this part.

§ 88.2 *Restrictions on Native Indian traps.*

(a) Not more than the 21 salmon fish-trap sites heretofore recognized as Indian salmon fish-trap locations as hereinafter described may be utilized for the purpose of salmon trap fishing by Indian villages, within the following described waters at the sites described. Subject to the limitations of paragraph (e) of this section, traps owned and operated by the native villages may be operated at any time within a described area when salmon net fishing is permitted in any part of such area, or adjacent districts, by the State of Alaska:

* * * * * * * * *

Metlakatla Indian Community
(Annette Island Fishery Reserve)

(d) All waters within a line from the international boundary at 131° west longitude to Mary Island light, Hog Rocks light, Bold Island light, Race Point, thence to the southern extremity of Vallenar Point, thence to Point Higgins, thence to Caamano Point, thence down the middle of Clarence Strait to the international boundary:

(1) Annette Island at 55° 15′ 09″ north latitude, 131° 36′ 10″ west longitude.

(2) Annette Island at 55° 12′ 52″ north latitude, 131° 36′ 10″ west longitude.

(3) Annette Island at 55° 02′ 47″ north latitude, 131° 38′ 53″ west longitude.

(4) Annette Island at 55° 05′ 41″ north latitude, 131° 36′ 39″ west longitude.

(5) Annette Island at 55° 01′ 54″ north latitude, 131° 38′ 36″ west longitude.

(6) Annette Island at 55° 00′ 45″ north latitude, 131° 38′ 30″ west longitude.

(7) Annette Island at 54° 59′ 41″ north latitude, 131° 36′ 48″ west longitude.

(8) Ham Island at 55° 10′ 13″ north latitude, 131° 19′ 31″ west longitude.

(e) During the 1960 fishing season and until the Secretary or his authorized representative determines otherwise, the villages may operate traps only at the following sites: Angoon: (1) (2) and (4); Kake: (3) (4) (8) and (9); Metlakatla: (2) (3) (4) and (6).

§ 88.3 *Size and operation of Indian salmon traps.*

(a) No trap shall extend more than 900 feet from shore to the outer face of the pot as measured at mean high tide when any part is in a greater depth of water than 100 feet.

(b) Poles shall be permanently secured to the webbing at each side of the mouth of the pot tunnel and shall extend from the tunnel floor to a height of at least 4 feet above the water. A draw line shall be reeved through the lower end of both poles and the top of one. During any period when commercial net fishing for salmon is prohibited by the State of Alaska in the waters open to trap fishing as above described, the tunnel walls shall be overlapped as far as possible, the line pulled tight and both secured so as to close the trap to fishing. In addition 25 feet of the webbing of the heart on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fish.

* * * * * * * * *

§ 88.8 *Modification of regulations.*

The regulations in this part will be modified from time to time as the Secretary of the Interior may deem necessary. The native Indians and Indian villages of Alaska shall be governed by these regulations in the waters where they apply or by the regulations of the State of Alaska, whichever are least restrictive to their fishing operations.

§ 88.9 *Enforcement.* Fishing activities in violation of these regulations will be subject to the sanctions imposed by the Act of June 6, 1924, as amended, 48 U.S.C. 226.

s/ FRED A. SEATON
Secretary of the Interior

April 6, 1960

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 20 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 326

METLAKATLA INDIAN COMMUNITY,
ANNETTE ISLAND RESERVE, *Appellant*,

vs.

EGAN, GOVERNOR OF ALASKA, et al.

No. 327

ORGANIZED VILLAGE OF KAKE, et al., *Appellants*,

vs.

EGAN, GOVERNOR OF ALASKA

On Appeal from the District Court for the District of Alaska

BRIEF FOR APPELLANTS IN NO. 327 ORGANIZED VILLAGE OF KAKE, AND ANGOON COMMUNITY ASSOCIATION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

METLAKATLA INDIAN COMMUNITY, etc. (No. 326)

ORGANIZED VILLAGE OF KAKE, et al. (No. 327)

vs.

EGAN, GOVERNOR OF ALASKA

On Appeal from the District Court for the District of Alaska

BRIEF FOR APPELLANTS IN NO. 327 ORGANIZED VILLAGE OF KAKE, AND ANGOON COMMUNITY ASSOCIATION

OPINIONS BELOW

The opinion of Kelly, J., of the District Court for the District of Alaska[1] appears in the Record at pp.

[1] So named in the statutes creating the court (Act of May 17, 1884, § 3, 23 Stat. 24; restated Act of June 6, 1900, § 4, 31 Stat. 321, 322, as amended, 48 U.S.C. § 101). This caption was used by the judge below on his opinion (R. 58). The same name was used in the latest expression of the State of Alaska through its legislature—which, if the contentions of the parties that the court is a *state* court are correct, should be conclusive. That is so especially since the Alaska legislature advertently changed its

59-66, and is reported in 174 F.S. 500. Supplemental Findings of Fact appear at pp. 67-69 of the Record. The opinion of Mr. Justice Brennan, as Circuit Justice, upon a temporary restraining order pending appeal is not officially reported but appears in 4 L. ed 2d 34, and 80 Sup. Ct. 33.

JURISDICTION

Formal Matters.—Jurisdiction of this Court is invoked under § 1257 of the Judicial Code, subpars. (1) and (2). The District Court for the District of Alaska announced its opinion on July 1, 1959, pursuant to which the complaints of these appellants in No. 327 were to be dismissed. R. 59-66. Oral notice of appeal was placed in the record at that time. R. 57-58. Written orders dismissing the complaints of these appellants were entered July 2, 1959 (as to Organized

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reference to the name in an earlier statute (Chap. 50 Sess. L. Alaska 1959, below) by amending it to read by this name. Chap. 151 Sess. L. Alaska 1959.

But the court has gone by various other names. Cf. "District Court for the Territory of Alaska", Statehood Act, §§ 13-18, and Proclamation of the President of February 20, 1960, 25 F.R. 1584; "District Court of the State of Alaska", chap. 50 Sess. L. Alaska 1959, § 31(1) (amended as above referred to). In titling the record, this Court's Clerk has also referred to the appeals from the "District Court of the State of Alaska" which, in view of the fact that the court is a post-admission state court, as is developed below, cannot be regarded as incorrect. Note that the judge has signed himself either "U.S. District Judge" (R. 66) or simply "District Judge" (R. 70).

Usually in this brief the court whose judgment is to be reviewed is referred to as the "transitional court" to identify that court during the period after the statehood of Alaska and before the court became *functus officio* on the establishment of the new District Court of the United States for the District of Alaska pursuant to the Statehood Act (Act of July 7, 1958, 72 Stat. 339, §§ 12, 18).

Village of Kake, S.R. 125, and as to Angoon Community Association, S.R. 126). After a stay granted by the Circuit Justice (accompanied by an opinion of Mr. Justice Brennan, July 1, 1959), these appellants also filed written notices of appeal on August 5, 1959 (S.R. 79). Appellee moved to affirm or dismiss; and by order of this Court of December 7, 1959, further consideration of jurisdiction was postponed to the hearing on the merits, and these cases were consolidated with that of the Metlakatla Indian Community, No. 326.

The Court Below Was the Highest Court in Which a Decision Could Be Had.—The court whose judgment is to be reviewed has ceased to exist. It was established by Act of May 17, 1884, § 3, 23 Stat. 24, restated in the Act of June 6, 1900, § 4, 31 Stat. 321, 322, as amended, quoted in our appendix from 48 U.S.C. § 101. It was a territorial court "with general jurisdiction in civil, criminal, equity and admiralty causes" and, as this Court observed in *Steamer Coquitlam* v. *United States* (1896), 163 U.S. 346, 352, was, in every substantial sense, the Supreme Court of the territory. Its judges were appointed for four-year terms rather than during good behavior. Sec. 10 of the 1900 Act (48 U.S.C. § 112). As a result, the court was a legislative, not a constitutional Art. III, court of the United States. *McAllister* v. *United States,* 141 U.S. 174, 179-186 (1891); *Summers* v. *United States,* 231 U.S. 92, 101-102 (1913). Cf. *International Longshoremen's & Warehousemen's Un.* v. *Juneau Spruce Corp.,* 342 U.S. 237, 240-243.

That court's existence survived the admission of the State of Alaska as a necessary transitional matter, pursuant to the Constitution of Alaska and pursuant

to the federal Statehood Act. The Constitution of Alaska, Art. IV, § 2, established a supreme court with final appellate jurisdiction, and, § 3, a superior court, which is a trial court of general jurisdiction. By Art. XV, referring to transitional measures, the Constitution provided for the continuance of all actions and suits (§ 2) and also provided (§ 17):

> "SECTION 17. Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisidction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law."

That is to say, the state-court functions of the old territorial court, the court below, would be abolished when the new courts were organized. By statute not long after admission, Alaska provided that the courts should be deemed "organized" pursuant to § 17 on January 3, 1962, though new cases might be filed as soon as one or more judges were appointed in a particular judicial district. Act of March 19, 1959, chap. 50 Sess. L. Alaska 1959, pp. 30-37, § 31(1), p. 36. The same section provided that until January 3, 1962, the jurisdiction of the state courts should be non-exclusive,

> ". . . and nothing in this Act shall diminish or deprive the District Court of the State of Alaska or the Court of Appeals or the Supreme Court of the United States of jurisdiction as provided by [the Statehood Act] . . ."

Subsec. (4) provided that if it were held that the District Court of the State of Alaska lacks jurisdiction to determine causes under laws of the state, then the appointment of superior and supreme court judges should be accelerated. About two months later, this act was amended to add a further condition under which appointments of judges should be accelerated—namely, if it were finally determined that the United States Court of Appeals for the Ninth Circuit lacks jurisdiction to hear appeals from the District Court of the District of Alaska.[2] Chap. 151 Sess. L. Alaska 1959, pp. 195-196. This latter contingency was realized. The Court of Appeals for the Ninth Circuit ruled that it had no jurisdiction to review judgments of the District Court for the Territory of Alaska after statehood, *Parker* v. *McCarrey,* 268 F. 2d 907 (June 16, 1959). In a series of decisions by that circuit, it was made clear that this denial of jurisdiction extended both to cases arising under federal law (and ordinary grist for a federal district court), and to cases arising under local law.[3] We are not aware that any effort was made to bring any of these cases to this Court.

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[2] The amendment also changed the reference to the transitional court from "District Court of the State of Alaska" to "District Court of the District of Alaska".

[3] Parker v. McCarrey itself was an application for prohibition and mandamus to stop proceedings in the transitional court where petitioner was awaiting trial on an indictment charging theft of U.S. Government property. The following day the Court of Appeals dismissed an appeal in a typically local-law situation in which defendant was charged with an offense committed prior to statehood but was tried in the district court following Alaska's admission. Deere v. United States (C.A. 9th, June 17, 1959), 268 F. 2d 912. Appeals were also dismissed the same day in Selid Constr. Co. v. Guarantee Ins. Co., 268 F. 2d 913; and Kosters v. United States, 268 F. 2d 913. Some months later (September) the same court dismissed an appeal in a motor-vehicle-removal case,

The federal Statehood Act had cognate provisions respecting the old territorial district court as a transitional court. Act of July 7, 1958, Pub. L. 85-508, 72 Stat. 339. A brand-new United States District Court was established under the Judicial Code effective upon admission of the State, § 12. No civil or criminal case was to abate because of admission of the state. § 13. Cases arising before admission were to be prosecuted "in the appropriate State courts or in the United States District Court for the District of Alaska" just "as if said State had been created and said courts had been established prior to the accrual of said causes of action." § 13, ¶ 2. All pending cases of such nature as to be within the jurisdiction of a district court of the United States were to be transferred to the United States District Court for the District of Alaska; "All other causes pending or determined in the District Court for the Territory of Alaska at the time of the

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Jackson v. United States (1959), 270 F. 2d 384. Extraordinary writs met the same fate for lack of jurisdiction, Emberg v. McCarrey (C.A. 9th, June 17, 1959), 268 F. 2d 913. Not so with a judgment in a criminal case entered prior to statehood; there, the court felt, it retained jurisdiction under 28 U.S.C. §§ 1291 and 1294. Short v. United States (C.A. 9th, 1959), 271 F. 2d 73. A somewhat anomalous case is Soby v. Johnson (C.A. 9th, September 8, 1959), 270 F. 2d 193, 197, where despite the fact that the court had Parker v. McCarrey in mind (p. 197) it noted that no question had been raised as its own jurisdiction, and proceeded to dispose of an appeal on the merits, overruling a contention going to the power of the transitional court to exercise powers of a United States District Court.

The status of the transitional court was rather extensively briefed in this Court at the last term, Kilpatrick v. McCarrey, No. 856 Misc. O.T. 1958, leave to file a petition for writ of prohibition and mandamus denied June 22, 1959, 360 U.S. 914. That case did not touch the question whether the Ninth Circuit lacked jurisdiction to hear appeals from the transitional court, postulated in Chap. 151 Sess. L. Alaska 1959, referred to in the text, the questions raised relating only to the jurisdiction or powers of the transitional court.

admission of Alaska as a State shall be transferred to the appropriate State court of Alaska." § 15. But by § 18 it was declared—

> "The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, shall not be effective until three years after the effective date of this Act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. . . ."

On February 20, 1960 (25 F.R. 1584) the President proclaimed that the United States District Court for the District of Alaska was prepared to assume its functions; "Accordingly, the jurisdiction of the District Court for the Territory of Alaska and the tenure of the judges, the United States attorneys, marshals and other officers of that court are now terminated."

When appellants filed their suit in the transitional court June 22, 1959, when the complaints were dismissed, and when the formal written notice of appeal was filed August 25, 1959, it was the *only* court, state or federal, to which recourse might be had. To be sure, other courts, state and federal, had been "established", or provided for, upon the admission of the State of Alaska which had occurred some five or six months earlier; but they were not yet in actual being,

that is, "organized", and when they would be was speculative. The "highest court of the State in which a decision could be had" had acted; appellants could come only here, as they did. Appointments to the new state courts were to be accelerated; but no retroactive rights to appeal to them as to cases earlier disposed of had been provided.

Appellee speaks[4] of this Court's jurisdiction in technical words pertaining to title; he asks had this Court, upon the appeal, "acquired an 'indefeasible' jurisdiction?" (Reply, p. 11). But where Congress has provided for appeal to this Court from the judgments of the highest court of a state in which decision could be had and the appeal has been taken, may the state in turn defeat that jurisdiction by providing further possible reviews? Apparently that is what respondent would have this Court believe the state attempted. This is claimed on the basis of the fact that after the three justices were appointed and sworn (the last, we are informed, on September 1, 1959), Rules of the Court were provided (September 25) and became effective October 5, 1959, authorizing appeals permitted by 50 Sess. L. Alaska 1959, § 31(4) as amended (that is, appeals which were to go to the Ninth Circuit), reviewed above. For the first time, in the October 5 Rules, a retroactive appeal was provided, to be taken if notice were filed within a time which commenced to run with the effective date of the rules instead of the effective date of the judgment.[5]

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[4] Brf. Appellee in Reply to Brfs. Opposing Motion to Affirm or Dismiss, p. 11.

[5] Rule 54(b), Rules of the Supreme Court of Alaska, Appendix p. 22. Since the Governor of the State was a party, under Rule 7(a), time for filing an appeal thus ran for 60 days from October

As to this case, no appeal to the Alaska Supreme Court was or might be authorized either at the time the appeal to this Court was noted or at the time the rules of the Alaska Supreme Court became effective. For the very statute relied upon as providing for it, 50 Sess. L. Alaska 1959, as amended by 151 Sess. L. Alaska 1959, provides (§ 31(2)) that "nothing in this Act shall diminish or deprive the . . . Supreme Court of the United States of jurisdiction as provided by Public Law 508, 85th Congress, and other laws applicable thereto." This gives recognition to the principle which would be applied even in the absence of such a provision; for as Chief Justice Marshall stated in *Mullen* v. *Torrance,* 9 Wheat. 537, 539 (1824)—

> "It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events."

Morgan v. *Morgan* (1817), 2 Wheat. 290, 297 (Marshall, C. J.); *Clarke* v. *Mathewson* (1838), 12 Pet. 164, 171 (Story, J.). See also *Smith* v. *Sperling,* 354 U.S. 91, 93 and n. 1 (1957).

The Transitional Court Was a State Court.—Appellee, in his reply to our brief on the motion to affirm or dismiss, raised the question whether the transitional court from which the appeal was taken was a state court at all, or whether it was a United States district court. (Reply Brf. pp. 8-9.) If it were the latter, then under

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5, 1959, or until December 4, 1959. Out of abundance of caution, these appellants (upon receipt December 1, 1959, of appellee's reply brief on the motion to dismiss, where the point was first made) mailed a notice of appeal to the newly-established court. Proceedings in the Alaska Supreme Court have been held to await the outcome here.

§ 2281 of the Judicial Code the application for injunction would have to be heard and determined by a three-judge court. After raising the question, respondent announced (pp. 12-13) his doubt that the court was acting as a federal district court, and acknowledged that all parties consented that it was acting as a state court.

When the state was admitted to the Union on January 3, 1959, there came to an end the authority which the United States had theretofore held under Art. IV, § 3, ¶ 2 of the Federal Constitution "to make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," and under which it could provide a district court of the territory with "general jurisdiction in civil, criminal, equity and admiralty causes" (48 U.S.C. § 101). The territorial court continued as an interim or transitional court, and continued to exercise—as it did in this case—the general jurisdiction of a state court. But it did so by authority of the State of Alaska; and very specific authority to do so was contained in the Constitution of Alaska, Art. XV, §§ 2 and 17. As to state causes of action, the court had become the agency of the state, and to no extent whatever constituted the organization of the new United States District Court for the District of Alaska, which had been authorized in the Statehood Act, § 12. That court was not to be organized for another year.

The case thus follows a formula arrived at under our constitutional system not without some pangs; but as a result of the history of the formula, neither can it leave a doubt. The early cases concerned the admission of Florida in 1845. *Benner* v. *Porter,* 9 How. 235, 242-243 (1850) held that plainly the people of the

new state could, as they had, avoid an interregnum by providing in their constitution for adopting the machinery of the territorial government for the time being and until superseded by the agency and authority of the constitution itself. But this Court left no doubt that the old territorial government was, upon admission of the new state, "displaced, abrogated, every part of it", so that the only remaining power was derived from state authority. Thus, an indictment under federal law by the transitional court was improper, Congress having made no provision for it. *Forsyth* v. *United States* (1850), 9 How. 571, 574-577. The Supreme Court of Florida agreed, and plainly held (*Beatty* v. *Ross* [1847], 1 Fla. 198, 207), that what the transitional courts did "they did as State Judges for several months after our admission." See also *Inerarity* v. *Curtis,* 4 Fla. 175, 179 (1851).

Difficulty thereafter was encountered when Wisconsin was admitted in 1848. A case pending in this Court on writ of error to the territorial supreme court failed; for while Congress and the state had provided for transfer from the old district court of the territory to the new United States District Court of cases within the federal jurisdiction, no provision was made for cases within the state jurisdiction as was the one pending here. *McNulty* v. *Batty,* 10 How. 72, 78-79 (1850). And when a similar situation occurred upon the admission of Nevada, a later act of Congress providing for remand to a state or federal court as the nature of the appeal may require was applied, though the Court noted it required consent both of the state and the federal government to transform cases into the new jurisdiction. *Freeborn* v. *Smith,* 2 Wall. 160, 174-176 (1864).

At length, Congress adopted general legislation governing the disposition of cases in the territorial courts upon statehood, whereby those of a state-court character would go to the courts of the state, those of a federal-court character to the new state United States courts. This legislation was applied as to Nebraska in *Express Co.* v. *Kountze,* 8 Wall. 342, 350 (1869), and *Baker* v. *Morton,* 12 Wall. 150, 153 (1870). Thereafter the situation was provided for in the admission acts—as to the Dakotas, see *Koenigsberger* v. *Richmond Silv. Min. Co.,* 158 U.S. 41, 48 (1895); Oklahoma, *Southern Sur. Co.* v. *Oklahoma,* 241 U.S. 582, 584-586 (1916). But as to the status of the transitional courts under this scheme, it has not been more neatly stated than in a circuit-court case relating to the admission of Colorado, *Ames* v. *Colorado Cent. R. Co.,* 1 Fed. Cas. p. 750, No. 324 (1876):

> "The territorial courts cease, on the admission of the state, to be courts of the territory, for the territorial government is displaced and abrogated; but, by adoption on the part of the state, with the consent of Congress, these courts become the provisional and temporary courts of the state."

The fact that the transitional court here was invested with federal-court functions pending organization of the new United States District Court for Alaska does not make it a court of the United States; for under the Supremacy Clause state courts are required to honor and accept cases based on federal right, even partaking of the nature of a penalty, if Congress so provides. *Testa* v. *Katt,* 330 U.S. 386, 389-394 (1947); *Claflin* v. *Houseman,* 93 U.S. 130, 136 (1876).

The court below put plainly in the record (R. 55-56) that under state law the court enjoyed a dual per-

sonality; that there was no question at that time but what he was acting as a state court; and that *qua* state court he was bound to consider and protect any assertion of federal right, so that it was unnecessary for him to exercise any federal-district-court jurisdiction over cases arising under the Constitution.

Section 4 of the Statehood Act Shows That the Case Is Not Moot.—Appellee's motion to dismiss or affirm pins the case for this Court's loss of jurisdiction on mootness. Says the state, appellants are here trying to keep us from regulating fishing because the Secretary of the Interior permitted them to fish in a certain way. While the Secretary had authority, for a transitional period, to make this authorization under § 6(e) of the Statehood Act, the Secretary's authority has expired as a result of a proviso (the state calls it the "Westland proviso") in § 6(e) that when the Secretary certified that the Alaska Legislature had made adequate provision for the administration, management, and conservation of the fisheries in the broad national interest, then, within a specified time, the state should take over the regulation of hunting and fishing. The state actually did take over January 1, 1960, following the Secretary's certification April 27, 1959 (Exec. Communication No. 903, 86th Cong., 1st Sess., Cong. Rec. April 28, 1960, 105 Cong. Rec. pp. 6247, 6169.)

But the state did not get jurisdiction to regulate fishing by appellant Indians under § 6(e) and the Secretary's certification to Congress; it could not. Section 4 of the Statehood Act forbade it. Act of July 7, 1958, 72 Stat. 339, Appendix p. 5. Section 4, quoted here to reflect an amendment (resulting in striking the material we bracket and inserting the

italicized matter) by the Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, § 2, provides—

> "SEC. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property [, belonging to the United States or which may belong to] *(including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for* said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation; . . ."

The state itself has repeatedly disclaimed the jurisdiction; and it is baffling to understand how the state can still assert the right to close up appellants' traps, unless it be that the equal-footing doctrine (which we deal with on the merits) entitles them to disregard their repeated undertakings and to abandon their "solemn" compact with the people of the United States. For if one thing be plain, it is that this jurisdiction has been abjured.

Alaska disclaimed in the Constitution, Art. XII, §§ 12 and 13, adopted by the vote of the people of

Alaska April 24, 1956.[6] What was disclaimed was not immediately, in the same document, reclaimed by Art. XV, § 24, and Ordinance No. 3 (a part of the Constitution, we may assume, by reference) prohibiting fish traps; for the ordinance does not purport to go beyond the jurisdiction which might abide in the state, as might be the case if it referred specifically to Indians, and so may not be read as applying to Indian fishing rights. Anyway, Art. XII, § 13, automatically conformed the new constitution to the act of admission.

But Alaska's disavowal of jurisdiction does not stop here. When the Statehood Act provided in § 4 for this solemn compact and this exclusive jurisdiction, Congress was careful to provide that the people of the state should themselves be given an opportunity to conform to this reservation of jurisdiction by the United States. Section 8(b) of the Statehood Act specifically provided for a vote of the people of Alaska on the proposition whether the provisions of the Statehood Act "reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein

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[6] Constitution of Alaska, Art. XII, Sec. 12—

". . . The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. . . .

"Sec. 13. All provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people."

made to the State of Alaska, are consented to fully by said State and its people." If not "fully consented to", the Statehood Act was ineffective. If consented to, "the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly." § 8(b). As the proclamation admitting the state shows (Appendix, p. 29) the people of Alaska again by their vote agreed to this exclusive federal jurisdiction; and if Ordinance No. 3 had been a part of the Constitution of Alaska and otherwise might have applied to these appellants, that constitution was amended to make it inapplicable.

Nor does the plain understanding as well as undertaking of the state stop even there: when the State sought an amendment of § 4 of the Statehood Act in the "Alaska Omnibus Act" it neither asserted that it had acquired jurisdiction over Indian fishing nor sought to have it transferred. Again, the retention of exclusive jurisdiction in the federal government was expressly provided. And the very Alaska statute asserted by appellee as authority to close up Indian fish traps again carries the specific waiver. Chap. 95 Stat. L. Alaska 1959, App. p. 26.

As a result, the controversy here is not moot; in the face of § 4, the transfer of fish-and-game department duties from the Secretary of the Interior to the state under § 6(e) did not to any extent grant the state a jurisdiction which it had abjured. Yet Alaska still asserts its jurisdiction to regulate the fishing of these Indians. Were it clearly to recant in this Court, then we might have a problem of mootness. But as it is, the state's argument is no more than to say that because the Secretary has lost his temporary-Alaska-fish-and-

game-department duties respecting all other fishing in Alaska's jurisdiction, it must follow that in some way he has invested the State with jurisdiction over Indian fishing in defiance of § 4 of the Statehood Act, that the state has taken that jurisdiction in defiance of its solemn compact, and that the very controversy which the state has made in taking this position is thereby mooted in the state's favor.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ETC.

The following are quoted in our separate appendix:

Treaty with Russia, Mar. 30, 1867, 15 Stat. 539, 542, Art. III.—App. 1-2.

Alaska Civil Government Act of May 17, 1884, 23 Stat. 24, 26, § 8, proviso.—App. 2-3.

R.S. § 1839, from Revised Statutes, Provisions Common to All the Territories, 1874.—App. 2.

Acts of May 17, 1884, § 3, 23 Stat. 24, and June 6, 1900, § 4, 31 Stat. 321, 322, as amended, to Provide a Civil Government for Alaska, from 48 U.S.C. as follows: 48 U.S.C. §§ 101, 112.—App. 3.

Judicial Code, 28 U.S.C., §§ 1291, 1294, as it read prior to Alaska Statehood Act.—App. 4.

Alaska Statehood Act of July 7, 1958, 72 Stat. 339, Pub. L. 85-508, §§ 1, 4, 6(e), 7, 8(a), (b), (c) and (d), 12, 13, 14, 15, 16, 17, 18.—App. 4-14.

Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, Pub. L. 86-70, § 2(a), (b).—App. 14-15.

White Act of June 6, 1924, 43 Stat. 464, as amended, from 48 U.S.C. §§ 221, 222, 226, 227, 228.—App. 15-17.

Constitution of Alaska as ratified by electorate of Alaska April 24, 1956, and effective under the Statehood Act on January 3, 1959: Art. IV, Secs. 1, 2, 3; Art. VIII, Sec. 15; Art. XII, Secs. 12, 13; Art. XV, Secs, 2, 4, 17, 24, 25; Ordinance No. 3.—App. 17-21.

Rules of the Supreme Court of Alaska, Rules 7(a), 53, 54(a), (b), (c), and (d), adopted September 25, effective October 5, 1959.—App. 21-22.

Session Laws of Alaska 1959, Chap. 17, Chap. 50, Secs. 31, 32(3) and (4); Chap. 95; Chap. 151.—App. 22-28.

Proclamations of the President: Jan. 3, 1959, admitting Alaska, 24 F.R. 81; U.S. Dist. Ct. Alaska prepared to assume functions, District Court of Alaska terminated, Feb. 20, 1960, 25 F.R. 1584.—App. 29-31.

Press Release, Secty. Interior Seaton, April 7, 1960, and proposed regulations to govern Indian Fishing in Alaska, Fed. Register April 9, 1960, 25 F.R. 3079.—App. 32-38.

Statement of Fish and Wildlife Service of all fish traps, Indian and non-Indian, operated in Alaska for last five years, dated April 13, 1960.—App. 39.

QUESTIONS PRESENTED

1. Is the reservation to the United States in the Alaska Statehood Act, § 4, of the property (including fishing rights) of Indians, together with exclusive jurisdiction over them, unconstitutional as violative of the equal-footing doctrine?

2. Do Alaska statutes, to the extent they regulate fishing by Indians with the use of traps, conflict with the express reservation to the United States of exclu-

sive jurisdiction over property (including fishing rights) of Indians pursuant to § 4 of the Statehood Act?

STATEMENT OF THE CASE

The complaints (S.R. 82, 102) assert the following facts on the basis of which the motion to dismiss was sustained:

Appellants, Village of Kake and Angoon Community Association, are each an Indian corporation chartered pursuant to the Indian Reorganization Act of 1934 [48 Stat. 984, 988, as amended 49 Stat. 1250, § 17; 25 U.S.C. § 477]; and each has as its membership an entire village of Thlinget Indians. The village of Kake is located at Kake, Alaska,[7] and that of Angoon is located at Angoon, Alaska.[8] S.R. 82-83, 102.

Each appellant operates fish traps, boats, canneries and related equipment which was purchased by the United States in trust for appellants as beneficial owners (S.R. 83, 102-103), although each appellant owes a sizeable debt to the United States arising out of the acquisition and operation of this equipment (S.R. 88, 108). The United States furnishes the funds for operating this equipment (S.R. 84, 103), the operation of which, at the present time and historically, is the only employment available to the members and constitutes the sole source of income for the calendar year for almost all of the members (S.R. 89, 108).

Operation of the traps is essential to the operation of the canneries; appellants do not have available to

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[7] Kake is located on the northwest side of Kupreanof Island approxmately 100 miles southwest of Juneau.

[8] Angoon is located on the southwest side of Admiralty Island, approximately 60 miles southwest of Juneau.

them an alternative method of maintaining their operations. ' Closing the canneries would wipe out the economic base of the members, leaving the villages with no means of self-support, the resulting damage extending to the very fiber of their social, economic and cultural wellbeing. S.R. 88-89; 108.

Although the regulations (24 F.R. 2053) of the Secretary of the Interior of March 7, 1959, prohibited fish traps generally, the prohibition was not applied to native fish traps and some traps of each of the appellants were designated for operation. S.R. 84-85, 104. The Secretary of the Interior based this distinction in treatment of Indian and non-Indian traps on the disclaimer of Indian fishing rights made by the State of Alaska, and on the long-standing supervisory control exercised by the United States for the protection of the Indians. S.R. 85, 104-105.[9]

Notwithstanding appellants were thus authorized to operate, appellee (Governor Egan) both personally and by his agents threatened appellants with seizure of their traps and criminal prosecution of the persons installing and maintaining them, and, on June 15, 1959, actually seized a trap which Kake had set out and arrested the President of Kake's Council and the foreman of the crew which set the trap. S.R. 86, 105-106.

The complaints charged, among other things, that sec. 4 of the Statehood Act and Art. XII, Sec. 12, of the Constitution of Alaska prevented the state from interfering with the control and management of Indian

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[9] See letter to Alaska Area Director set out at length at S.R. 131-132. The disclaimer of Alaska cited by the Secretary of the Interior is Sec. 4 of the Statehood Act, quoted in our Appendix p. 5.

fishing rights held by the Indians or the United States as trustee on their behalf; that the regulations allowing appellants to operate constituted an exercise by the United States of its exclusive powers over the fishing rights of Indians; that the regulation of Indians was exclusively in the United States; and that the state statutes (Constitutional Ordinance No. 3 and Chap. 17, Sess. L. Alaska 1959) were repugnant to the statutes and Constitution of the United States and of Alaska. S.R. 87-88; 106-107. A preliminary and a permanent injunction were prayed. S.R. 91-92; 110-111.

To these complaints appellee immediately moved to dismiss (S.R. 120, 122), asserting exclusive state jurisdiction over the lands and waters involved, that the state has authority to prohibit fish traps for commercial fishing; that the Constitution of Alaska has amended the White Act (of 1924), 48 U.S.C. §221 et seq. (App. 15-17); that the federal regulations (of March 7, 1959) are invalid; that the regulation permits a discrimination not permitted under the White Act and conflicts with the Constitution of Alaska, and that plaintiffs have no property right in a fish-trap location.

The court refused a restraining order prohibiting interference with the traps, but set over for a few days the matter of whether a temporary injunction should issue. S.R. 129-130. When the hearing continued, the court called attention to its status as an interim court (R. 55), stating that "Whatever might be said in reference to the Federal end of it, there certainly seems to be no question at this time but what we are acting as a State Court." He noted that a state court must recognize and protect matters of federal right, and

that recourse need not be had to a federal court. R. 56. Three days later, July 2, 1959, he filed an opinion on the merits, dismissing the complaints. He recognized the outright collision between federal and state power (R. 60), held that the state owns the tidelands (where the traps were to be installed), as a result of the equal-footing doctrine; that "Indian fishing rights do not include the right to fish with forbidden gear or in a manner prohibited to other citizens of the state" (R. 62); that the equal-footing doctrine means that the state has acquired not only the tidelands but "local sovereignty" as well (R. 62); that "The state has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people" (R. 64).

Accordingly, the court sustained the validity and application of Constitutional Ordinance No. 3 (App. 20.), which abolished the use of fish traps (R. 65), holding that for the Secretary of the Interior to permit the use of fish traps "would seem to impair the equal footing standing of the new state." R. 65. The court concluded that not only was the Secretary without authority but "that the State of Alaska has authority to prohibit all fish traps in Alaskan waters, including those of the plaintiffs, and the plaintiffs are not entitled to the relief here sought." R. 66.

While not reflected by the printed record, new regulations for the coming season governing the operation of appellants' fish traps have been proposed by the Secretary of the Interior, and are quoted in our Appendix, pp. 34-38. The Secretary again concludes that the fishing rights of appellants were preserved for them by Section 4 of the Statehood Act (App. 32-34.); and

to his administrative interpretation of the Statehood Act there is added that of the Department of Justice (App. 32).

ARGUMENT

It appears it were easy to have avoided any constitutional issue in these cases at all. At least to the non-Alaskan, the law of Alaska seems plain beyond cavil; under that law itself the wrongful exercise of state authority appears plain, and the state law itself seems beyond doubt to say the state has no jurisdiction. For Alaska has repeatedly disclaimed the jurisdiction here sought to be exercised; it has entered into a compact with the United States not to exercise it, and that has been ratified by vote of the people of Alaska themselves;[10] its State Constitution had expressly abjured both property in the fishing rights of Indians and

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[10] To the extent here relevant, Sec. 4 of the Statehood Act, (App. 5), as amended (App. 15) provides as a condition of admission for a compact of Alaska and its people with the United States whereby "they forever disclaim all right and title to any lands or other property . . . which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority . . ."

Sec. 8(b) of the same act (App. 8) provided for a vote by the people of the state whether the reservation of rights or powers to the United States were consented to by the State and its people. The election was held April 24, 1956, and the proposition agreed to. App. 29.

power to dispose of those rights,[11] and in its statutes implementing the closing of fish traps it specifically excepts Indian fish traps.[12]

Yet the highest court of the state for the time being, the transitional court, said here that the jurisdiction of Alaska actually does extend to this Indian fishing. It held (R. 64, 65) that Ordinance No. 3 of the Constitution applied, and (R. 66) that the Secretary of the Interior is without authority to regulate the Indians' fish traps but that the State of Alaska has authority to prohibit all fish traps in Alaskan waters including those of the Indians.

We assume that in accordance with the usual rule this Court will regard itself as bound by this construction by the state court and by appellee Governor as representing the state administrative officials concerned.[13] Hence we go to the two resulting questions: (1) Is the reservation of exclusive jurisdiction by the federal government in § 4 of the Statehood Act violative, as the court below held (R. 65), of the equal-footing doctrine of the federal Constitution or law? (2) Are the Alaska constitutional or statutory prohibitions of Indian fishing violative of § 4 of the State-

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[11] Const. Alaska, Art. XII, Sec. 12, (App. 18-19); *cf. id.*, Sec. 13, in conjunction with Sec. 4 of the Statehood Act, just above. Constitutional Ordinance No. 3, (App. 20), does not water down the disclaimer, since it does not expressly refer to Indian rights, and, if a part of the Constitution, and even if it did refer to Indian fishing rights, the Constitution stood amended pursuant to Sec. 8(b) of the Statehood Act and the plebiscite.

[12] Chap. 95, Sess. L. Alaska 1959, (App. 26).

[13] Aero Mayflower Trans. Co. v. Board of R.R. Commrs., 332 U.S. 495, 499-500 (1947); Supreme Lodge Knights of Pythias v. Meyer, 265 U.S. 30, 32-33 (1924).

hood Act, hence invalid under the Supremacy Clause of the federal Constitution? The answer to each is simple:

1. Sec. 4 of the Statehood Act Is Not Violative of the Equal-Footing Doctrine

In the last analysis, the state's case for invalidity of Sec. 4 of the Statehood Act will have to depend upon *Ward* v. *Race Horse,* 163 U.S. 504 (1896) (cited below, R. 62), *Coyle* v. *Smith,* 221 U.S. 559 (1911), and the tidelands cases commencing with *Pollard* v. *Hagan,* 3 How. 212 (1845). The court below appears to have placed its main reliance on the tidelands cases, since they involve property inuring to the state as a result of its admission on an equal footing with existing states.

In its gross aspects, *Ward* v. *Race Horse* was aberrant; it held that as a result of its admission as a state Wyoming could punish an Indian for violating a state game statute in killing seven elk off his reservation in reliance on a claimed treaty right to hunt on "unoccupied lands of the United States". Prior to *Ward* v. *Race Horse,* the reservation of lands to which Indians had had original title had been respected (*Gaines* v. *Nicholson,* 9 How. 356, 365 [1850]; and following *Ward* v. *Race Horse* the Court immediately returned to that earlier doctrine in *United States* v. *Winans,* 198 U.S. 371, 380-381 (1905), which held that though the white man felt he could make better use of the fishing right than the Indian[14], the United States could create rights while it held the territory which would be binding upon the state after admission, and that the rights conferred upon the Indians are not subordinate to the

[14] "It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in common." P. 382.

powers acquired by the state upon its admission into the Union upon an equal footing. This view has been consistently followed by this Court since, including further cases of state interference with Indian fishing. *Seufert Bros. Co.* v. *United States,* 249 U.S. 194, 198-9 (1919); *Tulee* v. *Washington,* 315 U.S. 681, 684-5 (1942). Exclusions of state jurisdiction over Indians by admission acts have uniformly been sustained as well in other situations against contentions based on the equal-footing doctrine. *Dick* v. *United States,* 208 U.S. 340, 353 (1908); *Ex parte Webb,* 225 U.S. 663, 682, 690 (1912); *United States* v. *Sandoval,* 231 U.S. 28, 38, 45-46, 49 (1913).[15] For the equal footing doctrine is of no greater dignity than the Congressional power to regulate commerce with the Indian tribes. *Dick* v. *United States,* 208 U.S. at p. 353. In 1954 this Court declined an opportunity to review an opinion of the Supreme Court of Idaho commenting instructively on the deviation in *Ward* v. *Race Horse. State* v. *Arthur,* cert. den. No. 552, O.T. 1953, 347 U.S. 937, denying review of 74 Ida. 251, 261 P. 2d 135, 138-139 (1953).

At the same time, *Ward* v. *Race Horse* is distinguishable on its face. This Court specifically noted (163 U.S. at p. 506) that Wyoming was admitted on an equal footing with the original states in all respects whatever "but in this act there was no exception, as there had been in the territorial act, in favor of the Indians." The lack of reservation of rights of and jurisdiction over Indians was emphasized and reem-

[15] Counsel who had convinced the Court in *Ward* v. *Race Horse* by this time had ascended this Bench and wrote the opinion in the *Sandoval* case, leaving no doubt as to the power of the United States, the distinction of *Coyle* v. *Oklahoma,* or the fact that such an exclusion in an admission act (New Mexico) did not offend equality with the other states.

phasized by the Court. p. 515. The distinction from the present case, with its express reservation of rights and jurisdiction, is plain.

Coyle v. *Smith,* 221 U.S. 559 (1911), is the most spectacular of the equal-footing cases. The act of admission of Oklahoma (and other states) of 1906 provided that the capital of Oklahoma should be located at Guthrie and should not be removed from Guthrie prior to 1913. The act was accepted by Oklahoma as irrevocable. Despite this undertaking, by act of 1910 Oklahoma changed the capital to Oklahoma City. This Court held that locating the capital or expending moneys for the capital were "essentially and peculiarly state business." It held the provision in the act of admission to be unconstitutional for failure to place the the state on a plane of equality with its sister states.

But *Coyle* v. *Smith* will not help appellee in this situation. Not only do we have the many cases sustaining an exception of right and jurisdiction regarding Indians, which we have just reviewed, including the specific distinction in the *Sandoval* case (above, n. 15), but *Coyle* v. *Smith* itself recognized and distinguished the situation in which the condition in the enabling act relates, as here, to matters of federal—not exclusively state—power. p. 570.

That leaves the tidelands cases as the last prop. *Pollard* v. *Hagan,* 3 How. 212 (1845), was particularly relied on by the court below (R. 62). That case was reaffirmed in *Goodtitle ex. dem. Pollard* v. *Kibbe,* 9 How. 471, 478 (1850), and *Doe ex dem. Hallett & Waller* v. *Beebe,* 13 How. 25, 26 (1851). But there again, the case deals with the broad language of agreement under which the state was admitted. 3 How. at p. 223—

> "When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, *except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States,* for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. *Nothing remained in the United States, according to the terms of the agreement, but the public lands.* And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain in the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted." (Italics added.)

Yet here we have the express reservation of rights and jurisdiction in the United States where jurisdiction is independently sustained under the federal Constitution against this very contention. *United States* v. *Sandoval,* 231 U.S. 28, 38, and cases cited. See also *Ex Parte Webb,* 225 U.S. 663, 669-670. In addition to tidelands, the doctrine of the tidelands cases covers beds of lakes and navigable waterways. Yet, the reservation of Indian fishing rights and jurisdiction has been honored as to each. See *Seufort Bros.* v. *United States,* 249 U.S. 194, 198-199 (1919); *Tulee* v. *Washington,* 315 U.S. 681, 684-685 (1942). Thus the tidelands cases do not support to any extent the unconstitutionality of § 4 of the Statehood Act.

2. To the Extent the Alaska Constitution and Statutes Regulate Indian Fishing They Violate Sec. 4 of the Statehood Act

Section 4 of the Statehood Act (App. 5-6) states the terms of a compact between Alaska and the United States whereby Alaska "forever" disclaims not only all rights or title to lands or other property, including fishing rights, held by any Indians or by the United States in trust for them, but also agrees that it "shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority" (with two exceptions immaterial here).

It is perhaps unnecessary to refer to the precise quantum or quality of the property held by or in trust for the Indians; that is regulated by federal law, and no matter what it is, until the federal government gives leave, under § 4, the State of Alaska is absolutely without any jurisdiction to define or limit those rights. At the same time, we do not doubt that Alaska has the same privilege as anyone else to urge its desires on the federal officials charged with regulating Indians. See the recent proposed regulations, and the solicitation of views by the Secretary of the Interior. 25 F.R. 3079, App. 34, 35.

Briefly, however, we should note that jurisdiction over the "uncivilized tribes" was expressly accepted by the United States in the Treaty with Russia of 1867, Art. III (App. 1-2). Since then, the legal position of Indians in Alaska is the same in relation to the federal government as Indians elsewhere. *Cohen,* HANDBOOK ON FEDERAL INDIAN LAW (1942), p. 40; FEDERAL INDIAN LAW (1958), p. 934, and authorities cited. As a result, broad legislative power to protect these Indians lies within the authority of Congress. *United States* v. *Sandoval,* 231 U.S. 28, 45-46 (1913); *United States*

v. *Kagama,* 118 U.S. 375, 383-384 (1886). The basis in the Constitution for this power has been variously ascribed to the commerce clause, the spending power, regulation of the national domain, the treaty-making power, conditions on the admission of new states, the war power, and others.[16] The need for power co-extensive with the extension of United States sovereignty to new areas westward, to deal with and to protect the aborigines who were there first, was obvious. As this Court observed, "Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *United States* v. *Kagama,* 118 U.S. 375, 384 (1886). The usual contempt of the alien pioneer for the rights, status and culture of the aborigine was not shared by the people of the United States as a whole; since the Northwest Ordinance they had provided by law for respect of the Indian title.[17]

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[16] Cohen, *Handbook of Federal Indian Law* (G.P.O., 1942), Ch. 5, pp. 89 and following.

[17] The same need for that protection today, as to these appellants, can be heard even through the words of the cold record. The court below acknowledges that "There has long been growing opposition to fish traps in Alaska, and plebicites held in the Territory in connection therewith have resulted overwhelmingly in votes for the abolishment of traps", that "The salmon runs in Alaska are being rapidly depleted", etc., R. 60-61. Yet note that Indian use of fish traps could not have caused the depletion; for (for instance) in 1956, Indian traps were only nine. (App. A to Brf. Appellants No. 326, p. 49) whereas the total traps were 247—a ratio of about 29 to 1 (App. this brief, p. 39). As the Alaska District Court said in United States v. Libby, McNeil & Libby (1952), 107 F. Supp. 697, 699, "it is no exaggeration to say that nothing since the purchase of Alaska has engendered so much ill-feeling and resentment as the Department's reservation policy and its encouragement of aboriginal claims, especially in the face of Miller v. United States, 9 Cir., 159 F. 2d 997, holding that aboriginal title was extinguished by the Treaty of Cession."

United States as Guardian &c v. *Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345-350 (1941). Cf. *Tlingit and Haida Inds. of Alaska* v. *United States*, 177 F. Supp. 452, 463-464 (C. Cls., 1959). While this Court in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), found that the bare, unrecognized aboriginal title of the Tlingit Indians did not entitle them to compensation from the United States for its deprivation, still this Court indicated that the problem of extent of Indian title was one for Congress. pp. 277-279).

Whatever may be the right of appellants to recover from the United States for a taking of their aboriginal rights, there can be no question that since not later than the Revised Statutes of 1874, § 1839 (App. 2), Congress has provided against impairing the rights of person or property of the Indians so long as they remained unextinguished by treaty; and a special provision in the act providing a civil government for Alaska provided they should not be disturbed in their possession of any lands in their use or occupation. Act of May 17, 1884, § 8, 23 Stat. 24, 26 (App. 2-3).

That policy continues without interruption to the present. It was expressly provided by Sec. 4 of the Statehood Act, which under the Supremacy Clause is the supreme law of the land. Cf. *Irvine* v. *Marshall*, 20 How. 558, 562-563 (1857). That it may be sustained against hostile state enactments as a compact or contract entitled to protection under the contract-impairments clause is also indicated. *Green* v. *Biddle*, 8 Wheat. 1, 92-93 (1823); *The Kansas Indians*, 5 Wall. 737, 751, *et seq.* (1866), as reviewed in *Coyle* v. *Smith*, 221 U.S. at pp. 578-579.

CONCLUSION

The judgment should be reversed and, pursuant to § 14 of the Statehood Act[18] (App. 12) and Art. XV, Sec. 17, of the Alaska Constitution (App. 20) the case should be remanded to the Supreme Court of Alaska.

Respectfully submitted,

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[18] Sec. 13 of the Statehood Act provides against abatement of pending actions and causes whereon a right has accrued but no proceeding commenced. Sec. 14 provides for appeals already taken to this Court or to the Ninth Circuit; and where final judgment has been rendered in the district court and appeals might be had except for the admission of the state, for appeal notwithstanding admission, to this Court or the Ninth Circuit under the provisions of then-existing law, and adds—"and in either case, the Supreme Court of the United States . . . in the event of reversal, shall remand the said cause to either the State supreme court or other final appellate court of said State, or the United States district court for said district, as the case may require . . ." The remand need not be rested on that section, since the same result would follow from the fact that Alaska has made its Supreme Court the successor of the court below. Const. Alaska, Art. XV, § 17, App. 20.

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IN THE

Supreme Court of the United States

OCTOBER TERM [redacted] 1961

No. 326 & 2

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE,
Appellant,

vs.

EGAN, GOVERNOR OF ALASKA, et al.

No. 327 & 3

ORGANIZED VILLAGE OF KAKE, et al., *Appellants,*

vs.

EGAN, GOVERNOR OF ALASKA

On Appeal from the District Court for the District of Alaska

APPENDIX TO BRIEF FOR APPELLANTS IN NO. 327

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STATUTES, ETC., INVOLVED

Treaty With Russia

March 30, 1867. 15 Stat. 539, 542

* * * * * * * * * *

ARTICLE III.

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

* * * * * * * * * *

FEDERAL STATUTES INVOLVED:

Revised Statutes. Provisions Common to All the Territories. 1874

* * * * * * * * * *

SEC. 1839. Nothing in this Title shall be construed to impair the rights of person or property pertaining to the Indians in any Territory, so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any Territory which, by treaty with any Indian tribe, is not, without the consent of such tribe, embraced within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of any Territory now or hereafter organized until such tribe signifies its assent to the President to be embraced within a particular Territory.

* * * * * * * * * *

Alaska Civil Government Act

May 17, 1844. 23 Stat. 24, 26, Sec. 8

* * * * * * * * * *

Provided, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: * * *

* * * * * * * * * * *

TITLE 48 UNITED STATES CODE

(The two sections which next follow embody the language establishing the District Court of Alaska from the Act of May 17, 1884, sec. 3, 23 Stat. 24, as restated in the Act of June 6, 1900, sec. 4, 31 Stat. 321, 322, as amended):

§ 101. District court; judges; divisions

There is established a district court for the District of Alaska, with the jurisdiction of district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes; and four district judges shall be appointed for the district, each at an annual salary of $22,500, who shall during their terms of office reside in the divisions of the district to which they may be respectively assigned by the President. The court shall consist of four divisions, which shall also be recording divisions.

* * * * * * * * * * *

§ 112. Appointment of attorneys, judges and marshals

The attorneys, judges, and the marshals provided for in sections 21-24, 44, 45, 67-73, 74-90, and 145 of this title shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold their respective offices for the term of four years and until their successors are appointed and qualified, unless sooner removed by the President for cause.

* * * * * * * * * * *

Title 28, United States Code

(as it read prior to Alaska Statehood)

• • • • • • • • • • •

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

• • • • • • • • • • •

§ 1294. Circuits in which decisions reviewable

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the District for the Territory of Alaska or any division thereof, to the Court of Appeals for the Ninth Circuit;

• • • • • • • • • • •

Alaska Statehood Act

July 7, 1958. PUBLIC LAW 85-508, 72 Stat. 339

To provide for the admission of the State of Alaska into the Union

• • • That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 8 (c) of this Act, the State of Alaska is hereby declared to be a

State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska entitled, "An Act to provide for the holding of a constitutional convention to prepare a constitution for the State of Alaska; to submit the constitution to the people for adoption or rejection; to prepare for the admission of Alaska as a State; to make an appropriation; and setting an effective date", approved March 19, 1955 (Chapter 46, Session Laws of Alaska, 1955), and adopted by a vote of the people of Alaska in the election held on April 24, 1956, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

* * * * * * * * * *

SEC. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided,* That nothing contained in this

Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further,* That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.

* * * * * * * * * *

SEC. 6.

* * * * * * * * * *

(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U. S. C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U. S. C., secs, 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U. S. C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: *Provided,* That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the admin-

istration, management, and conservation of said resources in the broad national interest: *Provided*, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife. Sums of money that are available for apportionment or which the Secretary of the Interior shall have apportioned, as of the date the State of Alaska shall be deemed to be admitted into the Union, for wildlife restoration in the Territory of Alaska, pursuant to section 8 (a) of the Act of September 2, 1937, as amended (16 U. S. C., sec. 669g-1), and for fish restoration and management in the Territory of Alaska, pursuant to section 12 of the Act of August 9, 1950 (16 U. S. C., sec. 777k), shall continue to be available for the period, and under the terms and conditions in effect at the time, the apportionments are made. Commencing with the year during which Alaska is admitted into the Union, the Secretary of the Treasury, at the close of each fiscal year, shall pay to the State of Alaska 70 per centum of the net proceeds, as determined by the Secretary of the Interior, derived during such fiscal year from all sales of sealskins or sea-otter skins made in accordance with the provisions of the Act of February 26, 1944 (58 Stat. 100; 16 U. S. C., secs. 631a-631q), as supplemented and amended. In arriving at the net proceeds, there shall be deducted from the receipts from all sales all costs to the United States in carrying out the provisions of the Act of February 26, 1944, as supplemented and amended, including, but not limited to, the costs of handling and dressing the skins, the costs of making the sales, and all expenses incurred in the administration of the Pribilof Islands. Nothing in this Act shall be construed as affecting the rights of the United States under the provisions of the Act of February 26, 1944, as supplemented and amended, and the Act of June 28, 1937 (50 Stat. 325), as amended (16 U. S. C., sec. 772 et seq.).

* * * * * * * * * *

SEC. 7. Upon enactment of this Act, it shall be the duty of the President of the United States, not later than July 3, 1958, to certify such fact to the Governor of Alaska. Thereupon the Governor, on or after July 3, 1958, and not later than August 1, 1958, shall issue his proclamation for the elections, as hereinafter provided, for officers of all elective offices and in the manner provided for by the constitution of the proposed State of Alaska, but the officers so elected shall in any event include two Senators and one Representative in Congress.

SEC. 8. (a) The proclamation of the Governor of Alaska required by section 7 shall provide for holding of a primary election and a general election on dates to be fixed by the Governor of Alaska: *Provided,* That the general election shall not be held later than December 1, 1958, * * *

* * * * * * * * * * *

(b) At an election designated by proclamation of the Governor of Alaska, which may be the general election held pursuant to subsection (a) of this section, or a Territorial general election, or a special election, there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, by separate ballot on each, the following propositions:

"(1) Shall Alaska immediately be admitted into the Union as a State?

"(2) The boundaries of the State of Alaska shall be as prescribed in the Act of Congress approved .... (date of approval of this Act) and all claims of this State to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States.

"(3) All provisions of the Act of Congress approved ..... (date of approval of this Act) reserving rights or powers to the United States, as well as those prescribing the terms or conditions of

the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people."

In the event each of the foregoing propositions is adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly. In the event any one of the foregoing propositions is not adopted at said election by a majority of the legal votes cast on said submission, the provisions of this Act shall thereupon cease to be effective.

The Governor of Alaska is hereby authorized and directed to take such action as may be necessary or appropriate to insure the submission of said propositions to the people. The return of the votes cast on said propositions shall be made by the election officers directly to the Secretary of Alaska, who shall certify the results of the submission to the Governor. The Governor shall certify the results of said submission, as so ascertained, to the President of the United States.

(c) If the Presdent shall find that the propositions set forth in the preceding subsection have been duly adopted by the people of Alaska, the President, upon certification of the returns of the election of the officers required to be elected as provided in section 7 of this Act, shall thereupon issue his proclamation announcing the results of said election as so ascertained. Upon the issuance of said proclamation by the President, the State of Alaska shall be deemed admitted into the Union as provided in section 1 of this Act.

Until the said State is so admitted into the Union, all of the officers of said Territory, including the Delegate in Congress from said Territory, shall continue to discharge the duties of their respective offices. Upon the issuance of said

proclamation by the President of the United States and the admission of the State of Alaska into the Union, the officers elected at said election, and qualified under the provisions of the constitution and laws of said State, shall proceed to exercise all the functions pertaining to their offices in or under or by authority of the government of said State, and officers not required to be elected at said initial election shall be selected or continued in office as provided by the constitution and laws of said State. The Governor of said State shall certify the election of the Senators and Representative in the manner required by law, and the said Senators and Representatives shall be entitled to be admitted to seats in Congress and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States.

(d) Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

* * * * * * * * * *

SEC. 12. Effective upon the admission of Alaska into the Union—

(a) The analysis of chapter 5 of title 28, United States Code, immediately preceding section 81 of such title, is amended by inserting immediately after and underneath item 81 of such analysis, a new item to be designated as item 81A and to read as follows:

"81A. Alaska";

(b) Title 28, United States Code, is amended by inserting immediately after section 81 thereof a new section, to be designated as section 81A, and to read as follows:

"§ 81A. Alaska

"Alaska constitutes one judicial district.

"Court shall be held at Anchorage, Fairbanks, Juneau, and Nome.";

(c) Section 133 of title 28, United States Code, is amended by inserting in the table of districts and judges in such section immediately above the item: "Arizona • • • 2", a new item as follows: "Alaska • • • 1";

• • • • • • • • • • •

SEC. 13. No writ, action, indictment, cause, or proceeding pending in the District Court for the Territory of Alaska on the date when said Territory shall become a State, and no case pending in an appellate court upon appeal from the District Court for the Territory of Alaska at the time said Territory shall become a State, shall abate by the admission of the State of Alaska into the Union, but the same shall be transferred and proceeded with as hereinafter provided.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said State, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be

subject to prosecution in the appropriate State courts or in the United States District Court for the District of Alaska in like manner, to the same extent, and with like right of appellate review, as if said State had been created and said courts had been established prior to the accrual of said causes of action or the commission of such offenses; and such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Alaska.

SEC. 14. All appeals taken from the District Court for the Territory of Alaska to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit, previous to the admission of Alaska as a State, shall be prosecuted to final determination as though this Act had not been passed. All cases in which final judgment has been rendered in such district court, and in which appeals might be had except for the admission of such State, may still be sued out, taken, and prosecuted to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit under the provisions of then existing law, and there held and determined in like manner; and in either case, the Supreme Court of the United States, or the United States Court of Appeals, in the event of reversal, shall remand the said cause to either the State supreme court or other final appellate court of said State, or the United States district court for said district, as the case may require: *Provided,* That the time allowed by existing law for appeals from the district court for said Territory shall not be enlarged thereby.

SEC. 15. All causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State which are of such nature as to be within the jurisdiction of a district court of the

United States shall be transferred to the United States District Court for the District of Alaska for final disposition and enforcement in the same manner as is now provided by law with reference to the judgments and decrees in existing United States district courts. All other causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State shall be transferred to the appropriate State court of Alaska. All final judgments and decrees rendered upon such transferred cases in the United States District Court for the District of Alaska may be reviewed by the Supreme Court of the United States or by the United States Court of Appeals for the Ninth Circuit in the same manner as is now provided by law with reference to the judgments and decrees in existing United States district courts.

SEC. 16. Jurisdiction of all cases pending or determined in the District Court for the Territory of Alaska not transferred to the United States District Court for the District of Alaska shall devolve upon and be exercised by the courts of original jurisdiction created by said State, which shall be deemed to be the successor of the District Court for the Territory of Alaska with respect to cases not so transferred and, as such, shall take and retain custody of all records, dockets, journals, and files of such court pertaining to such cases. The files and papers in all cases so transferred to the United States district court, together with a transcript of all book entries to complete the record in such particular cases so transferred, shall be in like manner transferred to said district court.

SEC. 17. All cases pending in the District Court for the Territory of Alaska at the time said Territory becomes a State not transferred to the United States District Court for the District of Alaska shall be proceeded with and determined by the courts created by said State with the right to prosecute appeals to the appellate courts created by said State, and also with the same right to prosecute ap-

peals or writs of certiorari from the final determination in said causes made by the court of last resort created by such State to the Supreme Court of the United States, as now provided by law for appeals and writs of certiorari from the court of last resort of a State to the Supreme Court of the United States.

SEC. 18. The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, shall not be effective until three years after the effective date of this Act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaka established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of the judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function as provided in this section.

* * * * * * * * * *

Approved July 7, 1958.

Alaska Omnibus Act

June 25, 1959. PUBLIC LAW 86-70, 73 Stat. 141

To amend certain laws of the United States in light of the admission of the State of Alaska into the Union, and for other purposes.

* * * * * * * * * *

FEDERAL JURISDICTION

SEC. 2. (a) Section 4 of the Act of July 7, 1958 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words "all such lands or other property, belonging to the United States or which may belong to said natives", and inserting in lieu thereof the words "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives".

(b) Section 6(e) of said Act is amended by striking out the word "legislative" and inserting in lieu thereof the word "calendar".

* * * * * * * * * *

White Act

Act of June 6, 1924, as Amended, 43 Stat. 464, 48 U.S.C. 221 *et seq.*

§ 221. Fishing areas; closed season; limitation on fishing.

For the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of the Interior from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. * * *

* * * * * * * * * *

§ 222. Unlawful fishing in areas; no exclusive rights to be granted; citizens.

From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided,* That every such regulation made by the Secretary of the Interior shall be of general application with the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior. • • •

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§ 226. Violation of fishing laws; punishment; forfeiture.

Any person, company, corporation or association violating any provisions of sections 221-224, 226-228 or 230-241 of this title, or of any regulation made under authority of said sections shall, upon conviction thereof be punished by a fine not exceeding $5,000 or imprisonment for a term of not more than ninety days in the county jail or by both such fine and imprisonment, and in case of the violation of section 233 of this title there may be imposed a further fine not exceeding $250 for each day the obstruction therein declared unlawful is maintained. Every boat, seine, net, trap, and every other gear and appliance used or employed in violation of said above-mentioned sections and all fish taken therein or therewith shall be forfeited to the United States and shall be seized and sold under the direction of the court in which the forfeiture is declared at public

auction and the proceeds thereof after deducting the expenses of sale shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such forfeiture shall be in rem under the rules of admiralty. * * *

* * * * * * * * * * *

§ 227. Employees of Fish and Wildlife Service as peace officers.

For the purposes of sections 221-224, 226-228 and 232-234 of this title all employees of the Fish and Wildlife Service, designated by the Director, shall be considered as peace officers and shall have the same powers of arrest of persons and seizure of property for any violation of the provisions of said sections as have United States marshals or their deputies. * * *

* * * * * * * * * * *

§ 228. Territorial powers not abrogated or curtailed.

Nothing in sections 221-224, 226-228 and 232-234 of this title contained, nor any powers conferred by said sections upon the Secretary of the Interior, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by sections 21-24, 44, 45, 67-73, 74-90, and 145 of this title. * * *

* * * * * * * * * * *

ALASKA CONSTITUTION AND STATUTES:

The Constitution of Alaska

(Agreed upon by Delegates February 5, 1956; adopted by referendum of the Alaska electorate April 24, 1956; effective under the Statehood Act January 3, 1959.)

ARTICLE IV

The Judiciary

Section 1. The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

Section 2. The supreme court shall be the highest court of the State, with final appellate jurisdiction. It shall consist of three justices, one of whom is chief justice. The number of justices may be increased by law upon the request of the supreme court.

Section 3. The superior court shall be the trial court of general jurisdiction and shall consist of five judges. The number of judges may be changed by law.

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ARTICLE VIII

Natural Resources

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Section 15. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

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ARTICLE XII

General Provisions

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Section 12. The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title

in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.

SECTION 13. All provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people.

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ARTICLE XV

SCHEDULE OF TRANSITIONAL MEASURES

To provide an orderly transition from a territorial to a state form of government, it is declared and ordained:

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SECTION 2. Except as otherwise provided in this constitution, all rights, titles, actions, suits, contracts, and liabilities and all civil, criminal, or administrative proceedings shall continue unaffected by the change from territorial to state government, and the State shall be the legal successor to the Territory in these matters.

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SECTION 4. All officers of the Territory, or under its laws, on the effective date of this constitution shall continue to perform the duties of their offices in a manner consistent with this constitution until they are superseded by officers of the State.

* * * * * * * * * *

SECTION 17. Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law.

* * * * * * * * * *

SECTION 24. Ordinance No. 1 on ratification of the constitution, Ordinance No. 2 on the Alaska-Tennessee Plan, and Ordinance No. 3 on the abolition of fish traps, adopted by the Alaska Constitutional Convention and appended to this constitution, shall be submitted to the voters and if ratified shall become effective as provided in each ordinance.

SECTION 25. This constitution shall take effect immediately upon the admission of Alaska into the Union as a state.

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ORDINANCE No. 3

ABOLITION OF FISH TRAPS

SECTION 1. Each elector who offers to vote upon the ratification of the constitution may, upon the same ballot, vote on a third proposition, which shall be as follows:

"Shall Ordinance Number Three of the Alaska Constitutional Convention, prohibiting the use of fish traps for the taking of salmon for commercial purposes in the coastal waters of the State, be adopted?"

Yes ☐

No ☐

SECTION 2. If the constitution shall be adopted by the electors and if a majority of all the votes cast for and against this ordinance favor its adoption, then the following shall become operative upon the effective date of the constitution:

"As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State."

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Rules of the Supreme Court of Alaska

PART IV. PRACTICE ON APPEAL—CIVIL CASES

Rule 7. APPEAL: TIME—NOTICE—BONDS.

(a) *When Taken.* The time within which an appeal may be taken to the supreme court shall be thirty (30) days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the state or an officer or agency thereof is a party, the time as to all parties shall be sixty (60) days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the court from which the appeal is taken may, in any action, extend the time for appeal not exceeding thirty (30) days from the expiration of the original time herein prescribed.

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Rule 53. EFFECTIVE DATE.

These rules shall take effect on October 5, 1959.

Rule 54. Special Application of Rules.

(a) *Appeals From District Court.* These rules shall be applicable to appeals from the District Court of the District of Alaska which may be allowed in accordance with the provisions of Section 32 (4) of Chapter 50 SLA 1959, as amended by Chapter 151 SLA 1959.

(b) *Time for Filing Notice of Appeal.* The time for filing a notice of appeal as provided in these rules is extended so that the time for filing such notice will begin to run from the effective date of these rules instead of the effective date of the judgment.

(c) *Use of Appellate Records.* Insofar as appellate records, briefs, documents and proceedings have already been prepared in conformity with the federal rules and appellate practice on the effective date of these rules, they will be accepted by this court even though not in conformity with the rules otherwise applicable.

(d) *Cases of Hardship.* Where hardship is created by virtue of the change in procedure requirements or practices from federal courts to the supreme court, the latter, on motion, may grant such procedural relief as the circumstances may require.

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Dated at Juneau, Alaska, this 25th day of September 1959.

Session Laws of Alaska 1959

CHAPTER 17

An Act

Relating to prohibiting fish traps on lands owned by the State of Alaska; providing for restrictive covenants in the sale or lease of such lands; defining violations; prescribing penalties; repealing Ch. 154, SLA 1955; and providing an effective date.

Be it enacted by the Legislature of the State of Alaska:

Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile driven or hand driven fish traps, on or over any lands or tidelands owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska.

Sec. 2. The lease or sale of any such State lands or tidelands shall contain a restrictive covenant in keeping with the intent of this Act.

Sec. 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed six months or by fine not to exceed $1,000.00 or by both such fine and imprisonment.

Sec. 4. Ch. 154 SLA 1955 is hereby repealed.

Sec. 5. This Act shall take effect immediately upon its passage and approval or upon its becoming law without such approval.

Approved February 25, 1959

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CHAPTER 50

An Act

Relating to the supreme and superior courts of the State of Alaska; providing for the promulgation of rules of civil and criminal proceedings within the courts of the State of Alaska; providing for their jurisdiction, the nomination, appointment, and qualification of justices and judges; providing for periodical approval by the voters; providing for the filling of vacancies and removal of justices and judges; providing for the com-

pensation of justices and judges; providing for the administration of the court system; and providing for an effective date.

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Article III. Organization

Sec. 31. Commencement and Transfer of Causes.

(1) The State courts shall be deemed organized for the purpose of transferring causes as provided in Section 17, Article XV of the Constitution of the State of Alaska, on the 3rd day of January, 1962. Provided, however, that causes may be commenced, filed and determined in the State courts in each judicial district at the time of the appointment of one or more judges for such district.

(2) The jurisdiction of the courts of the State in this Act provided shall be exclusive from and after the 3rd day of January, 1962 but prior to that date shall be non-exclusive, and nothing in this Act shall diminish or deprive the District Court of the State of Alaska or the Court of Appeals or the Supreme Court of the United States of jurisdiction as provided by Public Law 508, 85th Congress, and other laws applicable thereto.

Sec. 32. Declaration of Intent and Method of Transition. It is the intent of the Legislature by the passage of this Act to provide for the organization of the State courts in an orderly manner so that the same will be completed on or before January 3, 1962 and so that during the intervening period advantage may be taken of the district and appellate structure referred to in Public Law 508, 85th Congress. To effect this intention the State courts shall be organized in the following manner:

• • • • • • • • • • •

(3) Upon the appointment of the first supreme court justices, the supreme court shall, as soon as may be practical, consider the reports and studies of the Judicial

Council and thereafter make and promulgate such rules governing the administration of courts and the practice and procedure in civil and criminal cases as the court may deem appropriate. When the court has adopted such rules governing causes and procedure of the supreme and superior courts, the chief justice shall so advise the Judicial Council and within thirty (30) days thereafter the Judicial Council shall meet and submit to the Governor the names of the persons nominated for some or all of the superior court judges. The Judicial Council may submit the names of all persons nominated as superior court judges for all districts at this time or may submit the names of persons nominated in less than all of the judicial districts or less than all judges provided for in a district in such manner as will provide a gradual series of appointments consistent with the availability of physical facilities and court personnel.

(4) Notwithstanding the provisions of subsections (1), (2) and (3) of this section, in the event that either: a court of competent jurisdiction, by final judgment, declares that the District Court of the State of Alaska lacks jurisdiction to determine causes arising under the laws of the State, notwithstanding the provisions of Public Law 508, 85th Congress; or the President of the United States, by executive order, terminates the jurisdiction of the District Court of the State of Alaska, the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices or judges of all of the supreme and one or more or all superior courts of the State and in any event shall submit all of said names prior to January 3, 1962.

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Approved March 19, 1959

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CHAPTER 95

An Act

Prohibiting the operating of fish traps within the State of Alaska; amending Chapter 17, SLA, 1959; prescribing penalties; and providing an effective date.

Be it enacted by the Legislature of the State of Alaska:

Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; provided nothing in this section shall prevent the operation of small hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally operated in or above the mouth of any stream or river in Alaska; nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives.

Sec. 2. Section 1 of Chapter 17, SLA 1959, is hereby amended to read as follows:

Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or waters owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska.

Sec. 3. Sec. 2 of Chapter 17, SLA 1959, is hereby repealed.

Sec. 4 Sec. 3 of Chapter 17, SLA 1959, is hereby amended to read as follows:

Sec. 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed $5,000.00 or by both such imprisonment and fine.

Sec. 5. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year, or by a fine not to exceed $5,000.00, or by both such imprisonment and fine.

Sec. 6. This Act shall take effect immediately upon its passage and approval or upon its becoming law without such approval.

Approved April 17, 1959

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CHAPTER 151

An Act

Relating to the organization of the supreme and superior courts of the state; amending subsection (4) of Sec. 32 and subsection (2) of Sec. 31 of Chap. 50, SLA 1959; and providing for an effective date.

Be it enacted by the Legislature of the State of Alaska:

Section 1. Subsection (4), Sec. 32, Ch. 50, SLA 1959, is hereby amended to read as follows:

(4) Notwithstanding the provisions of subsections (1), (2) and (3) of this section, in the event that either: a court of competent jurisdiction, by final judgment, declares that the District Court of the District of Alaska lacks jurisdiction to determine causes arising under the laws of the State, notwithstanding the provisions of Pub-

lic Law 508, 85th Congress; or the President of the United States, by executive order, terminates the jurisdiction of the District Court of the District of Alaska; the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices or judges of all of the supreme and one or more or all superior courts of the State and in any event shall submit all of said names prior to January 3, 1962. In the event that a court of competent jurisdiction, by final judgment, declares that the United States Court of Appeals for the Ninth Circuit lacks jurisdiction to hear appeals from the District Court of the District of Alaska, the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices of the supreme court and appeals from the District Court of the District of Alaska may be made to the State Supreme Court. If, upon the occurrence of any of the events set forth in this subsection, the members of the first Judicial Council have not been appointed, the Governor shall forthwith fill the initial vacancies.

Sec. 2. Subsection (2) of Sec. 31 of Ch. 50, SLA 1959 is hereby amended to read as follows:

(2) The jurisdiction of the courts of the State in this Act provided shall be exclusive from and after the 3rd day of January, 1962 but prior to that date shall be non-exclusive, and nothing in this Act shall diminish or deprive the District Court of the District of Alaska or the Court of Appeals or the Supreme Court of the United States of jurisdiction as provided by Public Law 508, 85th Congress, and other laws applicable thereto.

Sec. 3. This Act shall take effect upon its passage and approval or upon its becoming law without such approval.

Approved May 1, 1959

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PROCLAMATIONS OF THE PRESIDENT:

24 Fed. Reg. 81, Fed. Reg. Jan. 6. 1959

ADMISSION OF THE STATE OF ALASKA INTO THE UNION

By the President of the United States of America

A Proclamation

WHEREAS the Congress of the United States by the act approved on July 7, 1958 (72 Stat. 339), accepted, ratified, and confirmed the constitution adopted by a vote of the people of Alaska in an election held on April 24, 1956, and provided for the admission of the State of Alaska into the Union on an equal footing with the other States of the Union upon compliance with certain procedural requirements specified in that act; and

WHEREAS it appears from information before me that a majority of the legal votes cast at an election held on August 26, 1958, were in favor of each of the propositions required to be submitted to the people of Alaska by section 8 (b) of the act of July 7, 1958; and

WHEREAS it further appears from information before me that a general election was held on November 25, 1958, and that the returns of the general election were made and certified as provided in the act of July 7, 1958; and

WHEREAS the Acting Governor of Alaska has certified to me the results of the submission to the people of Alaska of the three propositions set forth in section 8 (b) of the act of July 7, 1958, and the results of the general election; and

WHEREAS I find and announce that the people of Alaska have duly adopted the propositions required to be submitted to them by the act of July 7, 1958, and have duly elected the officers required to be elected by that act:

NOW, THEREFORE, I, DWIGHT D. EISENHOWER, President of the United States of America, do hereby declare and

proclaim that the procedural requirements imposed by the Congress on the State of Alaska to entitle that State to admission into the Union have been complied with in all respects and that admission of the State of Alaska into the Union on an equal footing with the other States of the Union is now accomplished.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington at one minute past noon on this third day of January in the year of our Lord nineteen hundred and fifty-nine, and of the Independence of the United States of America the one hundred and eighty-third.

[SEAL]

DWIGHT D. EISENHOWER

By the President:
CHRISTIAN A. HERTER,
Acting Secretary of State.

* * * * * * * * * * *

25 Fed. Reg. 1584, Fed. Reg. Feb. 24, 1960

Executive Order 10867

READINESS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA TO ASSUME THE FUNCTIONS IMPOSED UPON IT

WHEREAS the act of July 7, 1958, 72 Stat. 339, relating to the admission of the State of Alaska into the Union, provides that the United States District Court for the Territory of Alaska shall continue to function as theretofore for a period of three years after the effective date of that act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the

provisions of that act, is prepared to assume the functions imposed upon it; and

WHEREAS that act further provides that its provisions relating to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of the rights of litigants in suits before such courts shall not be effective until the expiration of the above-mentioned three-year period or until such Executive order is issued; and that the tenure of the judges, the United States Attorneys, Marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function; and

WHEREAS, I have appointed, by and with the advice and consent of the Senate, and commissioned the Honorable Walter N. Hodge to be United States District Judge for the District of Alaska, and he has taken his oath of office; and

WHEREAS Judge Hodge has appointed an acting United States Attorney, an acting United States Marshal, and other court officers; and

WHEREAS the United States District Court for the District of Alaska is now prepared to assume the functions imposed upon it:

NOW, THEREFORE, by virtue of the authority vested in me by section 18 of the said act of July 7, 1958, I hereby proclaim that the United States District Court for the District of Alaska is prepared to assume the functions imposed upon it. Accordingly, the jurisdiction of the District Court for the Territory of Alaska and the tenure of the judges, the United States Attorneys, Marshals, and other officers of that court are now terminated.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,

February 20, 1960.

Bureau of Indian Affairs Release, April 7, 1960

SEATON ANNOUNCES PROPOSED FEDERAL REGULATIONS TO PROTECT COMMERCIAL FISHING RIGHTS OF ALASKA NATIVES

A proposed new set of Federal regulations under which the commercial fishing rights of the Indians, Eskimos, and Aleuts of Alaska may be exercised, if they choose to utilize such rights, was announced today by Secretary of the Interior Fred A. Seaton.

The proposal is being forwarded to the *Federal Register* for publication in the near future. Comments are invited from interested parties for a period of 30 days after the date of publication.

The Department's sole purpose in proposing the regulations, Secretary Seaton emphasized, is to permit the Alaska natives to use there fishing rights which were preserved for the natives by Section 4 of the Alaska Statehood Act, if they choose to do so.

Secretary Seaton pointed out that when the Alaska Statehood Act was being considered by the Congress, the Department of Justice informed the Congress that the inclusion of a reference to "fishing rights" could well result in "raising an implication that there is a 'right or title' to fishing rights in the natives of Alaska" despite prior court holdings to the contrary.

"The Supreme Court," the Secretary stated, "has already enjoined the State of Alaska from interfering with native fish traps until it is determined whether these traps involve native fishing rights protected by the Statehood Act."

"The best legal advice I have been able to obtain from the Department of Justice and the Department of the Interior," the Secretary said, "has been to the effect that these fish traps are 'fishing rights' protected by the Statehood Act. Under the circumstances, I have no alternative but to permit these natives to operate these traps if they choose to do so.

"Congress created these rights and we cannot, by arbitrary or capricious action, abolish them. If the legal conclusions of lawyers in the Department of Justice and the Department of the Interior are correct—as reflected in the position taken in the Supreme Court—then only Congress could abolish the right created by the Congress for these natives to operate fish traps if they so cho[o]se. I am further advised that such action by the Congress might also raise questions of just compensation.

"As recently as 1952, 334 fish traps were operated in Alaska waters under regulations issued by Secretary Oscar L. Chapman. The Eisenhower Administration has complied with the wishes of the Alaskan electorate and eliminated all fish traps but these native traps, which I am advised I cannot eliminate," the Secretary stated.

"Furthermore," Secretary Seaton said, "I would not eliminate the rights of any native by administrative action without giving him his day in court. These native people have taken their cause to the highest court in our land and I am not going to act so as to deny them the very rights they seek to protect."

The major difference between the existing State regulations and the proposed new Federal rules relates to the use of commercial fish traps by the native people. No provision for the use of such traps is made by the State regulations. The Federal proposal limits the native people to the "traps used in the 1959 season."

The regulations also describe the location of 21 trap sites of the Angoon Community Association, the organized village of Kake and the Metlakatla Indian Community, which have been used at various times in the past by the three native communities.

The proposed regulation provides that during the 1960 fishing season and until otherwise authorized the villages may operate only 11 traps, the same number as were authorized in 1959 in accordance with the Department's position that the intent of the Alaska Statehood legislation was to retain in "status quo" the rights of the natives.

Prior to the 1959 fishing season the native communities brought legal action to enjoin the State of Alaska from interfering with the exercise of the fishing rights which were preserved for them by the Statehood Act. A temporary injunction was granted by the United States Supreme Court and will remain in effect until the Court issues a final decision in the case.

Under protection of the temporary injunction the native villages operated 11 fish traps during the 1959 season—four at Metlakatla, four at Kake, and three at Angoon.

The sole purpose of the proposed regulations is to spell out certain fishing rights which were secured to the Alaska natives under Federal law. In this connection, Secretary Seaton explained, any fishing activities by the natives in violation of either the Federal and the State regulations would be subject to penalties imposed by State law; however, encroachment of the natives' rights may result in the utilization of penalties provided by Federal law.

Indian Fishing Regulations in Alaska

25 Fed. Reg. 3079, April 9, 1960

Notice is hereby given that pursuant to the obligation imposed upon, and the authority vested in, the Secretary

of the Interior by Section 2 and 9 of Title 25, and Section 485 of Title 5, U.S. Code, and Section 4 of the Act of July 7, 1958, 72 Stat. 339 amended, 73 Stat. 141, it is proposed to amend 25 CFR by adding a new part 88 as set forth below. The purpose of these amendments is to protect certain fishing rights which have long been recognized; which derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq., other Federal statutes, regulations and custom; and which were secured to the Alaska Eskimos, Indians and Aleuts by Section 4 of the Alaska Statehood Act of July 7, 1958.

It is the policy of the Department of the Interior whenever practicable, to afford the public an opportunity to participate in the rule making process. Accordingly, interested persons may submit written comments, suggestions or objections with respect to the proposed amendments, to the Commissioner, Bureau of Indian Affairs, Washington 25, D. C., within 30 days after the date of publication of this notice in the Federal Register.

Part 88, reading as follows, is added to 25 CFR, Subchapter H:

§ 88.1 *Scope.* These regulations implement section 4 of the Act of July 7, 1958, 72 Stat. 339, as amended, by declaring existing fishing rights of Indians in Alaska and providing for the protection and control thereof. Provisions for those rights derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq., and the limitations and sanctions necessary to preserve such rights are included herein. These regulations are permissive, but shall not be construed as a limitation upon any native rights not mentioned in this part.

§ 88.2 *Restrictions on Native Indian traps.*

(a) Not more than the 21 salmon fish-trap sites heretofore recognized as Indian salmon fish-trap locations as hereinafter described may be utilized for the purpose

of salmon trap fishing by Indian villages, within the following described waters at the sites described. Subject to the limitations of paragraph (e) of this section, traps owned and operated by the native villages may be operated at any time within a described area when salmon net fishing is permitted in any part of such area, or adjacent districts, by the State of Alaska:

(b) Angoon Community Association: Within all waters in Chatham Strait between a true eastward line from South Passage Point and a true westward line from Point Gardnes to Baranof Island; and the waters of Peril Strait north and east of Sergius Narrows, including Hoonah Sound, at the following sites:

(1) Chichagof Island at 57°36′16″ north latitude, 134° 51′34″ west longitude.

(2) Admiralty Island at 57°22′28″ north latitude, 134° 34′18″ west longitude.

(3) Killisnoo Island at 57°28′15″ north latitude, 134° 36′35″ west longitude.

(4) Admiralty Island at 57°13′52″ north latitude, 134° 39′05″ west longitude.

(c) Organized Village of Kake: All waters, except (1) those within a line from Point Bishop to 58°11′28″ north latitude, 134°5′ west longitude, (2) northeast of a line from Point Stylenan to Point Anmer, and (3) waters south of a line from Point Ellis to Patterson Point; within a line following the latitude of Cape Decision easterly to Cape Decision, thence following the watershed on Kuiu Island to 56°40′ north latitude, 133°44′15″ west longitude, thence east across Koku Strait, thence across Kupreanof Island, passing north of Duncan Canal, to 56°54′ north latitude, thence to Horn Cliffs, thence to Castle Mountain, thence following the international boundary to Mount Ogilvie, thence to the northern extremity of Shelter Island, thence to the northern extremity of Mansfield Peninsula,

thence following the watersheds on Mansfield Peninsula and Admiralty Island to the southern extremity of Point Gardner, thence west to the watershed on Baranof Island, thence following the watershed to Cape Ommaney, thence the latitude of Cape Ommaney projected westward:

(1) Stephens Passage at 57°21′70″ north latitude, 133° 27′02″ west longitude.

(2) Frederick Sound at 57°11′27″ north latitude, 133° 34′02″ west longitude.

(3) Frederick Sound at 57°10′52″ north latitude, 133° 32′44″ west longitude.

(4) Admiralty Island at 57°18′40″ north latitude, 133° 57′21″ west longitude.

(5) Admiralty Island at 57°10′29″ north latitude, 134° 12′53″ west longitude.

(6) Herring Bay at 57°07′21″ north latitude, 134°19′45″ west longitude.

(7) Admiralty Island at 57°04′02″ north latitude, 134° 25′20″ west longitude.

(8) Kupreanof Island at 57°01′23″ north latitude, 134° 02′50″ west longitude.

(9) Kuiu Island at 56°55′52″ north latitude, 134°16′08″ west longitude.

* * * * * * * * * *

(e) During the 1960 fishing season and until the Secretary or his authorized representative determines otherwise, the villages may operate traps only at the following sites: Angoon: (1) (2) and (4); Kake: (3) (4) (8) and (9); Metlakatla: (2) (3) (4) and (6).

§ 88.3 *Size and operation of Indian salmon traps.*

(a) No trap shall extend more than 900 feet from shore to the outer face of the pot as measured at mean high tide when any part is in a greater depth of water than 100 feet.

(b) Poles shall be permanently secured to the webbing at each side of the mouth of the pot tunnel and shall extend from the tunnel floor to a height of at least 4 feet above the water. A draw line shall be reeved through the lower end of both poles and the top of one. During any period when commercial net fishing for salmon is prohibited by the State of Alaska in the waters open to trap fishing as above described, the tunnel walls shall be overlapped as far as possible, the line pulled tight and both secured so as to close the trap to fishing. In addition 25 feet of the webbing of the heart on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fish.

* * * * * * * * * *

§ 88.8 *Modification of regulations.*

The regulations in this part will be modified from time to time as the Secretary of the Interior may deem necessary. The native Indians and Indian villages of Alaska shall be governed by these regulations in the waters where they apply or by the regulations of the State of Alaska, whichever are least restrictive to their fishing operations.

§ 88.9 *Enforcement.* Fishing activities in violation of these regulations will be subject to the sanctions imposed by the Act of June 6, 1924, as amended, 48 U.S.C. 226.

s/ FRED A. SEATON
Secretary of the Interior

April 6, 1960

Statement of All Fish Traps Indian and Non-Indian Operated in Alaska Period 1954 Through 1959

UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
BUREAU OF COMMERCIAL FISHERIES
WASHINGTON 25, D. C.

April 13, 1960

John Cragun, Esq.
744 Jackson Place
Washington, D. C.

Dear Mr. Cragun:

Mr. Daniel M. Singer has requested that I provide you the following information concerning the total number of fish traps operated in Alaska in each of the years 1954 through 1959:

1954	216
1955	203
1956	247
1957	221
1958	243
1959	11

Sincerely yours,

s/ JOHN I. HODGES
John I. Hodges, Chief
Branch of Resources Management

FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 6 1960
JAMES R. BROWNING, Clerk

Nos. 2 and 3

In the Supreme Court of the United States

OCTOBER TERM [redacted] 1961

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, APPELLANT

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA, ET AL.

ORGANIZED VILLAGE OF KAKE, ET AL., APPELLANTS

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE STATE OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
Attorney,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 326

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, APPELLANT

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA, ET AL.

No. 327

ORGANIZED VILLAGE OF KAKE, ET AL., APPELLANTS

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE STATE OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The United States has not previously participated in these proceedings except that, at the request of Mr. Justice Brennan, it appeared at the oral hearing before him in support of the temporary restraining order sought by the Indian communities. This brief is filed to support the position of those communities that the restraint against action by the appellees should be made permanent.

ARGUMENT

I

THIS COURT HAS JURISDICTION OF THESE CASES

A. *The court below was a court of the State of Alaska at the time of the appeal:*—In *Parker* v. *McCarrey,* 268 F. 2d 907 (C.A. 9), the Ninth Circuit held that it had no jurisdiction of appeals from judgments rendered after January 3, 1959, the date of the President's proclamation of Alaska as a state, by the former United States District Court of the Territory of Alaska, even though the United States District Court for the District of Alaska was not organized or, at least, not functioning for lack of appointment of a judge.[1] This decision was followed in *Bridges* v. *Forbes,* 269 F. 2d 703 (C.A. 9), and *Jackson* v. *United States,* 270 F. 2d 384 (C.A. 9). We believe that these rulings of the Ninth Circuit are correct. See also *Kilpatrick* v. *McCarrey,* 360 U.S. 914.

Although the Ninth Circuit, in the *Parker* case, refused to express its opinion "on the current Alaska court situation," (p. 909) it is our position that, when Alaska was admitted as a state, the territorial institutions, including the territorial court, ceased to exist as such; that, by concurrent authority of the new State of Alaska (see Art. XV, Sec. 17, Constitution of the State of Alaska, Appendix A, *infra,* p. 33) and the United States (Section 18, Alaska Statehood Act, Appendix A, *infra,* p. 32), interim or transitional courts were

[1] A judge of the United States District Court was appointed on February 19, 1960, and other officials shortly thereafter.

created which, under established precedents, assumed the status of provisional state courts of the State of Alaska (*e.g., Benner* v. *Porter*, 9 How. 235, 241–242; *Ames* v. *Colorado Central R. Co.*, 1 Fed. Cas. 750). It is further the position of the United States that Congress could, and by Section 18 of the Alaska Statehood Act did, confer upon those state courts the power to try federal cases (see *Testa* v. *Katt*, 330 U.S. 386; *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 361–362), and that the judgments of such courts are reviewable here if they are the judgments of the highest court of the State in which a decision could be had.

B. *The court below was the highest court of the State at the time of appeal:*—At the time the appeals were taken, the Supreme Court of Alaska had not been organized, no justices had been appointed, nor had any rules been made. That was the situation on July 11, 1959, when the temporary restraining order was issued by Mr. Justice Brennan. Since that time, that court has been organized, rules were adopted effective October 5, 1959, and the court is now functioning. But the situation at the time the appeal was taken was, so far as the Supreme Court of Alaska was concerned, similar to that which exists when a particular kind of case is not reviewable by the highest court of a state, as, for example, in *Thompson* v. *City of Louisville*, Oct. Term 1959, No. 59, decided March 21, 1960; *Smith* v. *California*, 361 U.S. 147. Certainly, in the words of 28 U.S.C. 1257, these appeals were taken to this Court from "the highest court of a

State in which a decision could be had." Whether access to a higher court is closed because of jurisdictional limitations or for lack of organization should not affect the availability of review by this Court. And the issue of jurisdiction should, we believe, be tested by reference to the time when the notices of appeal were filed—at the latest—since that is the action which definitively deprives the trial court of its jurisdiction.[2]

C. *The decision should be reviewed by appeal or certiorari*:—This would seem to be a proper case for appeal on the ground (28 U.S.C. 1257(1)) that the decision below was against validity of the federal statute in that the authority of the Secretary of the Interior to regulate fishing by Indians has been denied, or under 28 U.S.C. 1257(2) on the ground that state laws have been held valid as against claims under the federal law, especially the Statehood Act. In any event, the issues are clearly such that the causes should be reviewed by certiorari if appeal is considered to be inappropriate.

II

THE CASES ARE NOT MOOT

The situation presented as to fisheries in Alaska substantially changed on January 1, 1960, when general regulatory authority was transferred to the State

[2] *In re Federal Facilities Realty Trust*, 227 F. 2d 651, 653 (C.A. 7); *Borgmeier* v. *Stone*, 233 F. 2d 818 (C.A. 7); *Thompson* v. *Harry C. Erb, Inc.*, 240 F. 2d 452, 454 (C.A. 3); *Walker* v. *Felmont Oil Corporation*, 262 F. 2d 163, 165 (C.A. 6), certiorari denied, 361 U.S. 840; *United States* v. *Frank B. Killian Company*, 269 F. 2d 491, 494 (C.A. 6).

of Alaska under Section 6(e) of the Statehood Act (Appendix A, *infra*, pp. 25–26). Issues concerning the relative authority of state and federal officials during the prior transitional period—the primary issues at the hearing in July 1959 before Mr. Justice Brennan—have become moot by the passage of time. However, this results in narrowing the area of controversy but does not terminate it. The question still remains whether Alaska can now prohibit operation by these Indians of their fish traps, regardless of the extent of the power or authority of the Federal Government or the manner in which it chooses to exercise it. This controversy as to the State's power to proceed against appellants would seem to prevent mootness regardless of what federal action might be taken. In any event, on April 9, 1960, the Secretary of the Interior gave notice of proposed rule-making which would permit operation during the 1960 fishing season of traps at three sites by the Angoon Community, at four sites by the Village of Kake, and at four sites by the Metlakatla Community (see 25 Fed. Reg. 3079; Appendix to Brief for the Appellants in No. 327, pp. 34–38). There is every reason to believe, therefore, that the 1959 controversy will be repeated in 1960, and hence that these cases are not moot.[3] See, *e.g.*, *Taylor* v. *McElroy*, 360 U.S. 709; *McGrain* v. *Daugherty*, 273 U.S. 135, 180–182; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498.

[3] Although other fish trap sites are mentioned in the order, operation during 1960 is limited to the 11 listed and the present issue is, we assume, likewise so limited.

III

THE STATE OF ALASKA LACKS JURISDICTION TO REQUIRE THE ELIMINATION OF THE INDIAN FISH TRAPS

We agree with the basic position of appellants that officials of the State of Alaska are not authorized to prohibit operation of the appellants' 11 fish traps. We reach this result, however, by a somewhat different route than they do and we disagree with certain assumptions or assertions made in the course of some of their arguments.

A. *The Alaska Indian background.*—The issue hinges on the proper interpretation of Section 4 of the Alaska Statehood Act (*infra,* pp. 11–12). Preliminary to a discussion of that Act it is important to summarize certain historical facts and established legal principles basic to the controversy.

Fishing has always been a matter of predominant importance to the natives of Alaska, as this Court has more than once recognized. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78; *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86. However, the United States has not, by treaty or agreement, established permanent homes—*i.e.,* created "recognized Indian title"—for any of the Alaskan natives. In two instances—those involved in *Alaska Pacific* and *Hynes, supra*—reservations, including adjoining fishing waters, have been set aside for the temporary use of the appellants in No. 326 (the Metlakatla) and the Native Village of Karluk. In *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, this Court held that an alleged taking of "unrecognized" Indian title from

Alaskan natives was not compensable under the Fifth Amendment "because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States * * *" (348 U.S. at 285). This decision further rejected the claim (which had been sustained by the Court of Appeals for the Ninth Circuit in *Miller* v. *United States*, 159 F. 2d 997) that statutes of 1884 and 1900—providing (in general) that natives in Alaska should not be disturbed in their possession of land actually occupied by them—were a recognition of a right of permanent occupancy. The Court repeated the distinction, strongly emphasized in the *Hynes* case,[4] between permissive occupation and a grant of legal rights and held that in the federal statutes "what was intended was merely to retain the *status quo* until further congressional or judicial action was taken" (348 U.S. at 278). The Court went on to say that "[t]his policy of Congress toward the Alaska Indian lands was maintained and reflected by its expression in the Joint Resolution of 1947 * * *" which authorized the action alleged in the *Tee-Hit-Ton* case to constitute a taking. Subsequently, the Court of Claims dismissed a petition of the Tee-Hit-Tons seeking recovery for

[4] In *Hynes* (337 U.S. at 103), the opinion described the situation as follows:

> An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim."

the alleged taking of an exclusive right of fishing. *Tee-Hit-Ton Indians* v. *United States,* 132 C. Cls. 624. After referring to the materials on which the Indians relied to establish a private exclusive right of fishing, the Court of Claims said (pp. 625–626):

> According to the present law, such a right could not be acquired, even by a purported grant from the Executive. The Act of June 6, 1924, 43 Stat. 464, "For the Protection of the Fisheries of Alaska," provides in Section 1 that "no exclusive or several right of fishery shall be granted" in Alaskan waters.

And after citing *Shively* v. *Bowlby,* 152 U.S. 1, and *Sutter* v. *Heckman,* 1 Alaska 81, the court concluded (pp. 626–627):

> If we, as the plaintiff's quoted authority says we must do, indulge every presumption against the supposition that at some time in the remote past a grant was made, though the evidence of it has been lost, this is no case for prescription, since those familiar with the history of the times say it was contrary to the policy of the Government to make such grants.

A year earlier, the Court of Claims had dismissed a petition seeking recovery for the alleged taking of the right of an Alaskan group to take seals. *Aleut Community of St. Paul Island* v. *United States,* 127 C. Cls. 328. The court held (pp. 334–335):

> Whatever rights the Aleuts had to take seals in the waters off St. Paul Island under Russian dominion, there can be no doubt that upon acquisition of that territory by the United States

> their right to do so was subject to the paramount power of the United States to regulate and control it.

It then concluded, referring to the various Acts of Congress relating to seal fishing (pp. 335–336):

> Under these Acts, the only right plaintiff had to kill seals was the right to kill them for food and clothing and for use in the manufacture of small boats, and for the benefit of the United States. The Government had the right to prohibit altogether plaintiff from engaging in sealing and, hence, had the right to permit it to do so only on the conditions imposed. When plaintiff killed seals it killed them for the benefit of the United States and with knowledge that the United States would sell the skins and put the proceeds of sale in its own treasury. Seals killed by the natives were Government seals.

Concerning alleged exclusive rights of fishing, this Court, in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, held that the White Act of June 6, 1924, 43 Stat. 464, under which the Secretary of the Interior regulated commercial fishing in Alaska, prohibited the creation of an exclusive right of fishing and that the enforcement provisions of that Act could not be used to implement the Executive Order issued under another statute which created the Karluk Reservation. However, the Court did approve (fn. 53, p. 123) *Dow* v. *Ickes*, 123 F. 2d 909, which sustained the permission given by the Secretary for trap fishing at certain locations.

In summary, at the time of passage of the Alaska Statehood Act, the general policy of Congress had not been to create exclusive rights of fishing in Alaska but had been to permit trap fishing by particular fishermen, including Indians. Permanent rights for Indians, either in lands or in fishing rights, had never been created by treaty, agreement, recognition of "original Indian title," or otherwise. Two temporary reservations, especially of waters adjoining the lands for fishing purposes, had been created for the Metlakatla (appellants in No. 326) and one other group. And Congress had protected the natives' actual possession pending further action.

One further factor requires mention. Under a Special Jurisdictional Act of June 19, 1935, 49 Stat. 388, the Tlingit and Haida Indians of Alaska filed suit in the Court of Claims to recover for the alleged taking of Indian title to "southeastern Alaska lying east of the one hundred and forty-first meridian." The Court of Claims (in October 1959) held that they were entitled to recover for the taking, or for the failure of the United States to prevent others from taking, rights of these Indians to some 20,000,000 acres of land and adjacent waters in Alaska. *Tlingit and Haida Indians of Alaska* v. *United States,* 177 F. Supp. 452. The first action of the United States said by the Court of Claims to be a taking from the Tlingit and Haida Indians was the establishment of the Metlakatla Reservation here involved (*id.,* p. 467). The Court of Claims said that the "most valuable asset lost to these Indians was their fishing rights in the area they once used and occupied to the exclusion of all

others" (*id.*, p. 468).[5] With this background, we turn to the Statehood Act.

B. *Control over Indian fishing was reserved to the United States under Section 4 of the Alaska Statehood Act:*—The full text of Section 4, before amendment, is as follows:

> SEC. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided,* That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim

[5] We by no means agree with this decision but have considered it to be inappropriate now to seek review by this Court since the issue as to amount of liability has not been determined and that determination may well influence the question whether the case is important enough to warrant review by this Court.

> shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further,* That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.*

In our view, the correct construction of this Section is that the federal rights over and power to control Indian lands, fisheries and other interests were preserved in statu quo. There was neither relinquishment of rights and a grant to the State (as it seems to contend), nor was there a recognition or grant of rights to the Indians as against the United States. Preservation of that existing situation unchanged was not, we believe, inconsistent with equal footing or with the Submerged Lands Act. But preservation of the existing situation does mean that the Federal Government continues to have exclusive control over Indian fishing in Alaska.

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* See also the amendments to Section 4 made by the Alaska Omnibus Act, 73 Stat. 141, *infra*, p. 20, fn. 12; Appendix to Brief for Appellants in No. 327, pp. 14–15.

1. The precise terms of Section 4 (as amended in 1959), as they bear on the Alaska Indians, deserve careful analysis because those terms embody the exact powers retained by the Federal Government in this field. The statute first provides that the State disclaims all right and title to "any lands *or other property* (*including fishing rights*), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or *other property* (*including fishing rights*), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the *absolute jurisdiction and control of the United States* until disposed of under its authority * * *" (emphasis added). But the Section immediately goes on, in its first proviso, to provide explicitly that the Statehood Act shall not in any way affect, for or against the claimants, "any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto". The proviso then emphasizes its purpose to leave all pre-existing claims totally unaffected by the Statehood Act by declaring that nothing in the Act should be read to authorize, establish, recognize, or confirm the validity or invalidity of any such claim.

Our reading of Section 4, in the light of this proviso (which was added at the request of the Department of Justice), is (a) that Congress retained in the Federal Government, for the future, "absolute

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jurisdiction and control" over all Indian fishing, whether or not those "fishing rights" could be considered compensable "property" in the normal sense, but (b) that Congress did not wish to take any stand whatever with respect to claims against the United States by Alaska Indians that they had compensable property, including compensable fishing rights, of which they could not be deprived without compensation. In other words, where money was involved—*i.e.*, "claims" against the Federal Government—Congress deliberately intended to leave matters in statu quo, and made no grant or confirmation to the Indians. Where money was not involved—"absolute jurisdiction and control" over Indian fishing from the viewpoint of regulation—Congress deliberately intended to keep full control in the Federal Government (*i.e.*, under the protection of the Interior Department) over Indian "fishing rights" (rather than to vest control in the States), whether or not those "fishing rights" rose to the dignity of compensable rights or were mere privileges accorded by the Federal Government in its discretion. The "fishing rights" of which Section 4 speaks need not be true property rights—and, in our view, were not—but they are fishing privileges (or "rights" in a broader sense) subject to regulation and control by the Federal Government. By the same token, other Indian "property" or "land" (as those terms are used in Section 4) need not be land or property to which the Indians have any vested rights against the United States.

2. The State's motion to affirm or dismiss, at page 16 (see also fn. 2, p. 17), suggests that it will contend that the admission of Alaska abolished the Metlakatla

Reservation or at least that part extending 3,000 feet from land.[7] If the phrase in Section 4, "any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives," is read to mean property to which the Indians have *vested rights* as against the United States, like treaty reservations or recognized Indian title, then it would follow under the State's contention that the Metlakatla and Karluk reservations had been abolished by creation of the State. But such a construction is precluded by the fact that it would simply read this provision out of the Act—since it would not apply to any property in Alaska (see *supra*, pp. 6–10)—and would mean that Congress had been performing vain acts in adding the proviso and in revising the language in the Alaska Omnibus Act of 1959, 73 Stat. 141; that amendment emphasizes the language of Section 4 that "all such lands * * * shall be and remain under the absolute jurisdiction and control of the United States". See Brief for the Appellants in No. 326, at pp. 37–39.

3. On the other hand, the appellants in No. 327 have spoken of their fishing rights and their possessory rights as if they were vested compensable rights as against the United States (Br. Opposing Motion to Dismiss, pp. 2, 5, 7). As indicated above, we cannot agree that the Statehood Act vested, granted, or recognized any rights of that description. Rather, we think

[7] The suggestion (Motion to Affirm, p. 17, fn. 2) that the Proclamation reserving the waters was void *ab initio* plainly lacks merit in view of *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 113–114.

that the Act referred to those rights of temporary possession, until the United States should act otherwise, which were being exercised, especially by means of the fish traps of appellants, at the time of passage of the Act and admission of Alaska to the Union. We believe that Congress thereby reserved control to the Federal Government over Indian lands and fishing until other provision should be made.

Nor can we agree with the implications of the phrases, in the proposed Indian fishing regulations published by the Interior Department on April 9, 1960, 25 Fed. Reg. 3079 (see Appendix to Brief for Appellants in No. 327, pp. 34–38), referring to appellants' "fishing rights which have long been recognized; which derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq. [the White Act], other Federal statutes, regulations and custom; and which were secured to the Alaska Eskimos, Indians and Aleuts by section 4 of the Alaska Statehood Act", and characterizing the proposed regulations as "declaring existing fishing rights of Indians in Alaska" (25 Fed. Reg. 3079; Appendix to Brief for Appellants in No. 327, p. 35)—insofar as these terms may tend to imply that appellants' fishing "rights" are in any way vested or protected as against action by the Federal Government, or legislatively "recognized" as against the Federal Government, so as to be immune from alteration or abolition without payment of compensation. Similarly, we do not believe that Section 4 of the Statehood Act—in retaining "absolute jurisdiction and control" in the United States over Indian property, including fishing rights—made it mandatory for the Secretary of the Interior to continue to grant fish-

trap privileges to appellants.[8] Our position is that under Section 4 of the Statehood Act the Secretary has full discretionary authority, pursuant to the White Act, 44 Stat. 752, 48 U.S.C. 221, to regulate and control Indian fishing in Alaska; he is no more compelled to permit the use of fish-traps in 1960 than he was in 1959 (see *Ketchikan Packing Co.* v. *Seaton*, 267 F. 2d 660 (C.A.D.C.)), but he has the power to do so if he chooses. The Secretary has full authority to do what he considers proper for the protection of Indian fishing rights,[9] including enlargement of fishing rights beyond those now enjoyed, subject to his consideration of other pertinent factors, including conservation.

And if the Secretary does elect to permit the use of fish-traps by appellants, in 1960 or future years, he will not be acting contrary to the White Act's proviso against the grant of an exclusive right of fishery to Indians (see *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 116–123).[10] By virtue of Sections 4 and 6 of the

[8] A press release issued by the Interior Department on April 7, 1960, in connection with the publication of the proposed regulations, seems to assume that the Secretary is *required* to permit these fish-traps, that he has no discretion to decide against their use in 1960 or thereafter, and that only Congress can decide to do away with the use of fish-traps by appellants. See Appendix to Brief for Appellants in No. 327, pp. 32–34. As indicated in the text, *supra*, we do not agree with these assumptions and have so informed the Department of the Interior. We may add that, in our view, the Department of Justice has never advised the Interior Department that the Secretary has no alternative but to permit the appellants to operate their traps if they choose to do so, or that only Congress can abolish the use of fish traps by appellants.

[9] The views of the Department of the Interior on the rights of the Indians and the duties of the Secretary are set forth in Appendix B, *infra*, pp. 35–39.

[10] This proviso reads as follows:

Provided, That every such regulation made by the Secre-

Alaska Statehood Act, the White Act can apply, from 1960 onward, only to Indian fishing in Alaska—control over non-Indian fishing now being lodged wholly in the State—and the Secretary's decision to allow Indians to use fish-traps would not discriminate against any person now subject to the White Act. The separate treatment accorded appellants (as compared to non-Indian fishermen) stems, not from any grant to appellants of an exclusive or special right under the White Act, but simply because that Act now applies only to Indian fishing. There is no discrimination or special treatment under the White Act as it now exists.

4. Our construction of Section 4 accords with the intent of Congress, both as expressed in the proviso of Section 4 (which was specially added) and as shown by the legislative history of that Section. In Hearings before the Senate Committee on Interior and Insular Affairs on S. 50, 83d Cong., 2d Sess., the subject of native rights was considered from many aspects (*e.g.*, pp. 122, 135, 137). The nature of pending cases, including the Court of Claims *Tlingit* case mentioned above (pp. 10–11), was explained (pp. 206 *et seq.*). The then pending *Tee-Hit-Ton* case (*supra*, pp. 6–8) was discussed (p. 210), as were the *Hynes* case and the Ninth Circuit *Miller* case (pp. 211–216), *supra*, pp. 6–7. See also *id.*, pp. 231–235, 260–268, 284, 293, 339.

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tary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. * * *

The House Committee in the 84th Cong. (H. Rept. No. 88, 84th Cong., 1st Sess.) said (p. 47): "It is provided that no attempt will be made to deal with the legal merits of the indigenous rights but to leave the matter in status quo for either future legislative action or judicial determination." The House Committee in the 85th Cong., 1st Sess. (H. Rept. No. 624, p. 19) repeated this statement of the purpose of Section 4 and the proviso. The Senate Committee expressed the same thought in more detail, saying (S. Rept. No. 1163, 85th Cong., 1st Sess., p. 15):

> * * * The bill in its present form does not and is not intended to change or affect the laws of the United States relating to jurisdiction over Indian or native lands.
>
> The first proviso of section 4 directs that nothing contained in the act shall be construed to affect the existence or validity of any claim against the United States nor be construed as an interpretation of the meaning or application of any Federal law pertaining to such claims. The purpose of the proviso is to leave the legal question as to the existence or validity of any claim against the United States, including native claims, in exact status quo, and to leave the question for subsequent legislation or judicial decision without expressing any opinion or mandate in this act.
>
> The second proviso includes within the compact a stipulation that the State shall not impose taxes on property of the United States or native property except to the extent authorized or to be authorized by Congress, but the restriction on taxation does not apply to property held by individual natives in fee without

restrictions on alienation. This proviso expresses existing law as it applies within the States and is not intended to effect any change in such law.

Congress did add the phrase "(including fishing rights)," over the objections of the Department of Justice (which feared that the phrase might raise an implication that these Indian fishing "rights" were compensable rights),[11] but, as we have suggested, this added phrase can properly be read, together with the proviso to Section 4, as making sure that the Federal Government would retain control over Indian fishing (and not as endowing these "fishing rights" with the character of compensable property). For it is indisputable (from the legislative history summarized above) that Congress was fully informed as to the differences of view as to native rights in Alaska and expressed, in every possible way, its intent to preserve the status quo.[12] No reason appears why the Act should not be interpreted to give effect to that intent.

C. *The reservation of federal control over Indian fishing, regardless of property rights, is not incon-*

[11] See H. Rept. No. 624, 85th Cong., 1st Sess., p. 31; S. Rept. No. 1163, 85th Cong., 1st Sess., at p. 47.

[12] The amendment of Section 4 by the Alaska Omnibus Act was made to make sure that the provision "all such lands * * * shall be and remain under the absolute jurisdiction and control of the United States" would not be interpreted to apply to lands of the United States in Alaska other than those used by natives. The importance of this limitation is emphasized by the fact that, as of June 30, 1959, the United States owned 99.1 per cent of the land in Alaska. See Inventory Reports of Real Property Owned by the United States Throughout the World (General Services Administration, 1959).

sistent with "equal footing" or with the Submerged Lands Act:—

1. The basic case of *Coyle* v. *Oklahoma,* 221 U.S. 559, recognized that "equal footing" does not prevent reservation of federal power as to matters which are within the constitutional powers of the Federal Government; the Court made reference (pp. 570, 574) to the power to regulate commerce among the States and with the Indian tribes and also public lands. Since the authority over Indians arises from the commerce clause and the treaty and war-making power, as well as from the control of disposition of federal property,[13] its exercise is not and cannot be limited simply to reserving lands for Indians. Because of the history of federal-Indian relations, and because of the geographic situation in continental United States, that control was exercised, first, in terms of reserving areas for use by the Indians to the complete exclusion of whites and of state law, and, later, to modified amalgamation with the white population by the allotment process and permissive application of state law to a limited degree, subject always to federal controls for the protection of the Indians. See *Board of Comm'rs* v. *Seber,* 318 U.S. 705, 716, where this Court summarized the history and stated that, "[T]he plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions." Cf. *Williams* v. *Lee,* 358 U.S. 217. The power

[13] As to the various sources of the "federal power to regulate and protect the Indians and their property against interference even by a state", see *Board of Comm'rs* v. *Seber,* 318 U.S. 705, 715.

has not hinged on any considerations of principles of property law or of the existence of rights, legal, equitable or moral, in particular lands. Thus, while the Indians have no such right as against the United States in lands temporarily set aside for their use, such as reservations created by Executive Order, *Sioux Tribe* v. *United States*, 316 U.S. 317, this Court has never held that this circumstance diminishes the federal power to regulate such Indians or permits application of conflicting state law. Cf. *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99.

When dealing with Indians in the northwestern United States where fishing, especially in tidal waters, was of great concern and required protection to promote the welfare of the Indians, the courts have recognized that such compelling circumstances may produce an exception to results that might otherwise follow from admission of a state to the Union. Although it is often said that tidelands in territories are held in trust for future states and that title thereto vests in the state upon admission, that is not the result when a reservation has been created for Indians. *Moore* v. *United States*, 157 F. 2d 760 (C.A. 9), so held in concluding that the State of Washington's fishing regulations did not extend to tidelands of the Quillayute Indian Reservation.[14] In *Alaska Pacific Fisher-*

[14] See, also, *Shively* v. *Bowlby*, 152 U.S. 1, 48, 57–58; *Taylor* v. *United States*, 44 F. 2d 531, 533 (C.A. 9); *Montana Power Co.* v. *Rochester*, 127 F. 2d 189, 191 (C.A. 9); *United States* v. *Romaine*, 255 Fed. 253, 259 (C. A. 9).

ies v. *United States,* 248 U.S. 78, this Court said (pp. 87–88):

> That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. *National Bank* v. *County of Yankton,* 101 U.S. 129, 133; *Shively* v. *Bowlby,* 152 U.S. 1, 47–48, 58; *United States* v. *Winans,* 198 U.S. 371, 383. The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safe-guarding and advancing a dependent Indian people dwelling within the United States. See *United States* v. *Kagama,* 118 U.S. 375, 379, *et seq.; United States* v. *Rickert,* 188 U.S. 432, 437.

It is clear that exclusive rights to the fishing sites here concerned could have been specifically reserved by Congress through creation of a temporary Indian reservation, regardless of whether permanent beneficial rights might be later vested in the Indians. It follows, we believe, that the lesser reservation of power to control and regulate Indian fishery may constitutionally be reserved, and that this is what was done with respect to Alaska.[15]

[15] The specific reservation in Section 4 of the Statehood Act is the reason *Ward* v. *Race Horse,* 163 U.S. 504, is irrelevant here.

2. What we have said disposes of any contention based on the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1311–1315, which specifically excepts "lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band or group of Indians or for individual Indians" (43 U.S.C. 1313(b)). The Submerged Lands Act is specifically referred to in Section 6(m) of the Statehood Act, which says that Alaska "shall have the same rights as do existing States thereunder." Certainly, Congress saw no conflict between that Act and the reservation of control over Indian fisheries in Section 4 of the Statehood Act.

CONCLUSION

For the foregoing reasons it is submitted that the judgments below should be reversed.

Respectfully submitted.

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MAY 1960.

APPENDIX A

ALASKA STATEHOOD ACT (72 STAT. 339)

Section 1.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 8(c) of this Act, the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska entitled, "And Act to provide for the holding of a constitutional convention to prepare a constitution for the State of Alaska; to submit the constitution to the people for adoption or rejection; to prepare for the admission of Alaska as a State; to make an appropriation; and setting an effective date", approved March 19, 1955 (Chapter 46, Session Laws of Alaska, 1955), and adopted by a vote of the people of Alaska in the election held on April 24, 1956, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

* * * * * *

Section 6(e).

* * * *Provided,* That the administration and management of the fish and wildlife resources of Alaska

shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: * * *.

* * * * *

Section 8(d).

Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

* * * * *

Section 12.

Effective upon the admission of Alaska into the Union—

(a) The analysis of chapter 5 of title 28, United States Code, immediately preceding section 81 of such title, is amended by inserting immediately after and underneath item 81 of such analysis, a new item to be designated as item 81A and to read as follows: "81A. Alaska";

(b) Title 28, United States Code, is amended by inserting immediately after section 81 thereof a new section, to be designated as section 81A, and to read as follows:

"§ 81A. Alaska

"Alaska constitutes one judicial district.

"Court shall be held at Anchorage, Fairbanks, Juneau, and Nome.";

(c) Section 133 of title 28, United States Code, is amended by inserting in the table of districts and judges in such section immediately above the item: "Arizona * * * 2", a new item as follows: "Alaska * * * 1";

(d) The first paragraph of section 373 of title 28, United States Code, as heretofore amended, is further amended by striking out the words: "the District Court for the Territory of Alaska,": *Provided,* That the amendment made by this subsection shall not affect the rights of any judge who may have retired before it takes effect;

(e) The words "the District Court for the Territory of Alaska," are stricken out wherever they appear in sections 333, 460, 610, 753, 1252, 1291, 1292, and 1346 of title 28, United States Code;

(f) The first paragraph of section 1252 of title 28, United States Code, is further amended by striking

out the word "Alaska," from the clause relating to courts of record;

(g) Subsection (2) of section 1294 of title 28, United States Code, is repealed and the later subsections of such section are renumbered accordingly;

(h) Subsection (a) of section 2410 of title 28, United States Code is amended by striking out the words: "including the District Court for the Territory of Alaska,";

(i) Section 3241 of title 18, United States Code, is amended by striking out the words: "District Court for the Territory of Alaska the";

(j) Subsection (e) of section 3401 of title 18, United States Code, is amended by striking out the words: "for Alaska or";

(k) Section 3771 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words: "the Territory of Alaska,";

(l) Section 3772 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words: "the Territory of Alaska,";

(m) Section 2072 of title 28, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words: "and of the District Court for the Territory of Alaska";

(n) Subsection (q) of section 376 of title 28, United States Code, is amended by striking out the words: "the District Court for the Territory of Alaska", *Provided,* That the amendment made by this subsection shall not affect the rights under such section 376 of any present or former judge of the District Court for the Territory of Alaska or his survivors;

(o) The last paragraph of section 1963 of title 28, United States Code, is repealed;

(p) Section 2201 of title 28, United States Code, is amended by striking out the words: "and the District Court for the Territory of Alaska"; and

(q) Section 4 of the Act of July 28, 1950 (64 Stat. 380; 5 U.S.C., sec. 341b) is amended by striking out the word: "Alaska,".

Section 13.

No writ, action, indictment, cause, or proceeding pending in the District Court for the Territory of Alaska on the date when said Territory shall become a State, and no case pending in an appellate court upon appeal from the District Court for the Territory of Alaska at the time said Territory shall become a State, shall abate by the admission of the State of Alaska into the Union, but the same shall be transferred and proceeded with as hereinafter provided.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said State, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the appropriate State courts or in the United States District Court for the District of Alaska in like manner, to the same extent, and with like right of appellate review, as if said State had been created and said courts had been established prior to the accrual of said causes of action or the commission of such offenses; and such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Alaska.

Section 14.

All appeals taken from the District Court for the Territory of Alaska to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit, previous to the admission of Alaska as a State, shall be prosecuted to final determination as though this Act had not been passed. All cases in which final judgment has been rendered in such district court, and in which appeals might be had except for the admission of such State, may still be sued out, taken, and prosecuted to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit under the provisions of then existing law, and there held and determined in like manner; and in either case, the Supreme Court of the United States, or the United States Court of Appeals, in the event of reversal, shall remand the said cause to either the State supreme court or other final appellate court of said State, or the United States district court for said district, as the case may require: *Provided,* That the time allowed by existing law for appeals from the district court for said Territory shall not be enlarged thereby.

Section 15.

All causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State which are of such nature as to be within the jurisdiction of a district court of the United States shall be transferred to the United States District Court for the District of Alaska for final disposition and enforcement in the same manner as is now provided by law with reference to the judgments and decrees in existing United States district courts. All other causes pending or

determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State shall be transferred to the appropriate State court of Alaska. All final judgments and decrees rendered upon such transferred cases in the United States District Court for the District of Alaska may be reviewed by the Supreme Court of the United States or by the United States Court of Appeals for the Ninth Circuit in the same manner as is now provided by law with reference to the judgments and decrees in existing United States district courts.

Section 16.

Jurisdiction of all cases pending or determined in the District Court for the Territory of Alaska not transferred to the United States District Court for the District of Alaska shall devolve upon and be exercised by the courts of original jurisdiction created by said State, which shall be deemed to be the successor of the District Court for the Territory of Alaska with respect to cases not so transferred and, as such, shall take and retain custody of all records, dockets, journals, and files of such court pertaining to such cases. The files and papers in all cases so transferred to the United States district court, together with a transcript of all book entries to complete the record in such particular cases so transferred, shall be in like manner transferred to said district court.

Section 17.

All cases pending in the District Court for the Territory of Alaska at the time said Territory becomes a State not transferred to the United States District Court for the District of Alaska shall be proceeded with and determined by the courts created by said State with the right to prosecute appeals to the appel-

late courts created by said State, and also with the same right to prosecute appeals or writs of certiorari from the final determination in said causes made by the court of last resort created by such State to the Supreme Court of the United States, as now provided by law for appeals and writs of certiorari from the court of last resort of a State to the Supreme Court of the United States.

Section 18.

The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, shall not be effective until three years after the effective date of this Act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of the judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function as provided in this section.

CONSTITUTION OF ALASKA

(See H. Rept. No. 624, 85th Cong., 1st Sess., pp. 49–79)

* * * * *

Article XV, Section 1.

All laws in force in the Territory of Alaska on the effective date of this constitution and consistent therewith shall continue in force until they expire by their own limitation, are amended, or repealed.

* * * * *

Article XV, Section 4.

All officers of the Territory, or under its laws, on the effective date of this constitution shall continue to perform the duties of their offices in a manner consistent with this constitution until they are superseded by officers of the State.

* * * * *

Article XV, Section 17.

Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law.

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48 U.S.C. 101

There is established a district court for the District of Alaska, with the jurisdiction of district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes; and four district judges shall be appointed for the district, each

at an annual salary of $15,000, who shall during their terms of office reside in the divisions of the district to which they may be respectively assigned by the President. The court shall consist of four divisions, which shall also be recording divisions.

* * * * *

APPENDIX B

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., May 4, 1960.

By messenger

90-2-0-544

Hon. J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington, D.C.

DEAR MR. RANKIN: We have reviewed the draft of brief which you propose to file *amicus curiae* in the Supreme Court in *Metlakatla Indian Community, Annette Island Reserve* v. *Egan, Governor of Alaska, et al.*, No. 326, and in *Organized Village of Kake, et al.* v. *Egan, Governor of Alaska*, No. 327.

We are pleased to see that your study of these cases has led you to conclude that the court has jurisdiction and that the cases have not become moot. We are also pleased to note your position that the purpose of section 4 of the Alaska Statehood Act was to maintain the status quo until the Congress should provide otherwise. That is the position which this Department has consistently taken and which has been communicated to you in our prior correspondence and discussions.

In response to your invitation, we should like to restate and expand the expression of the views and position of the Department of the Interior on two points which are touched upon by the proposed brief and which have been the subject of several discussions

between representatives of our two departments. These being matters of predominant importance to the natives of Alaska they are, by that token, of the greatest concern to the Secretary of the Interior in his traditional role as the officer of the executive branch of the Government charged by law with the administration of Indian affairs and the execution of the national policy respecting the Indians.

The two points to which we refer are somewhat interrelated. They have to do with (1) whether the purpose and effect of section 4 of the Alaska Statehood Act, as amended, was to define and classify Indian fishing rights as vested, compensable property, and (2) the scope of the Secretary's regulatory power over the Indian fishing activity.

Section 4 of the amended Statehood Act preserves in status quo full Federal control over Indian lands and other property, including fishing rights. It does this in terms that withhold these matters from the reach of State authority, reciting specifically that they shall "be and remain under the absolute jurisdiction and control of the United States." Quite clearly, from the language of section 4 in its entirety as well as its legislative history, Congress manifested its intent to maintain the status quo, taking this action with knowledge of the prior rulings of the Supreme Court which recognized that the ultimate power to resolve the problem of native rights in Alaska rested with the Congress. See *Hynes* v. *Grimes,* 337 U.S. 86 (1949); *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955). This means to us that the Congress maintained in status quo the position of the United States as it existed immediately before statehood, namely, the continuation of full Federal control over the Indian fishing activity and the retention of full Federal power to define, classify,

resolve and determine the nature and extent of Indian fishing rights. Also, the Congressional purpose to maintain the status quo must mean to us that the Indians' rights, whatever their nature, were preserved under full Federal authority for ultimate determination by the Congress or the courts. The act made clear the lack of State authority but made nothing compensable as against the United States which was not compensable before statehood. We feel these conclusions must surely inhere in the conception that the Statehood Act was designed to maintain the status quo.

Any exercise by the Secretary of the Interior of regulatory power over the Indian fishing activities obviously must be by way of implementation of the Statehood Act and cannot be contrary to the Congressional objective of maintaining the status quo. So considered, the Secretary of the Interior in regulating the Indian fishing activity was required to continue the Indians' fish-trap operations as he found them to be immediately before statehood. The statute speaks in terms of the *natives'* fishing rights which, as we have demonstrated, are to be maintained in status quo until the Congress or the courts may clarify or resolve the matter. It follows logically that the natives' fishing rights could not be maintained in status quo by the Secretary of the Interior regulating their fishing activity in a way that would limit it to something less than that visible to the Congress when section 4 of the Statehood Act was enacted. Moreover, the Statehood Act, speaking in terms of native fishing rights cannot be equated into a grant of power to the Secretary to limit or eliminate Indian fishing. We must reject categorically the idea that section 4 of the Statehood Act, designed to maintain the status quo, also clothed the Secretary of the Interior with unlimited discretionary authority to limit

or shrink the Indian fishing activity that existed on the instant before statehood. It has been recognized by the courts that the power to regulate cannot be exercised in a way that abridges or destroys the Indian rights which are the subject of the regulation. See *Mason* v. *Sams*, 5 F. (2d) 255 (1925); *Tulee* v. *Washington*, 315 U.S. 681 (1942). And no remnants of regulatory power under the White Act (48 U.S.C. 221) could have survived the Statehood Act so as to clothe the Secretary with discretionary authority to limit or destroy the Indian fishing activity which Congress had held in status quo. The view that the Secretary of the Interior is clothed with full discretionary authority under the White Act to shrink the Indian fishing activity after the enactment of the Statehood Act undermines and makes ineffective the entire concept of Congress having maintained the status quo until it could resolve the problem of native rights as a matter of legislative prerogative. Indeed, the argument in favor of full discretionary authority in the Secretary to regulate Indian fishing after Alaska statehood must lead to the illogical conclusion that the Secretary of the Interior, being without Congressional direction or limitation, could not only limit the Indian fishing activity but could enlarge it as well. Here, again, the fallacy of the view that the Secretary has full discretionary authority is demonstrated merely by reference to the Congressional intention to preserve the status quo.

Historically, the purpose of retained federal controls in Indian matters has always been the protection of the Indians, and the Secretary of the Interior, in the exercise of regulatory authority over the subject denominated by the Congress as Indian "fishing rights" could not lose sight of the historical obliga-

tion to protect the Indians' rights, and to do so within the law.

To summarize:

1. The purpose and effect of section 4 of the Alaska Statehood Act was to maintain the status quo, leaving undisturbed after statehood the noncompensable character of those Indian fishing activities which were noncompensable before statehood.

2. The Secretary of the Interior, in exercising regulatory authority over the Indian fishing activity, must do so by way of implementation of the Statehood Act and cannot, by regulation, limit or terminate the fish-trap operations in which the Indians were engaged immediately before statehood.

Sincerely yours,

GEORGE W. ABBOTT, *Solicitor.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 2

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees*.

On Appeal from the Supreme Court of the State of Alaska

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Alaska, entered on June 2, 1961, affirming a judgment of the transitional District Court for the State of Alaska.[1] It submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

[1] The appeal was pursued in the Supreme Court of Alaska in accordance with the following order of the Supreme Court of the United States in Nos. 326 and 327, O.T. 1959, dated June 20, 1960:

"THESE CAUSES came on to be heard on the transcript of the record from the District Court for the State of Alaska, and were argued by counsel.

"ON CONSIDERATION WHEREOF, It is ordered that these cases be held in the docket of this Court to afford the Supreme Court of Alaska the opportunity to rule on questions open to it for decision in these cases and that these causes be continued with directions to appellants to pursue their appeals to the Supreme Court of Alaska for disposition not inconsistent with the opinion of this Court and the stay granted by Mr. Justice Brennan on July 11, 1959, is continued until the final disposition of these cases."

OPINION BELOW

The opinion of the Supreme Court of Alaska is as yet unreported. The opinion of the transitional District Court, filed on July 1, 1959, is reported at 174 F. Supp. 500. The opinion of the Supreme Court of Alaska is set forth in an Appendix which is filed herewith as a separate document.

A companion case, involving a direct appeal from the transitional District Court and raising the same substantive questions as this appeal, was previously before this Court. The opinion of Mr. Justice Brennan who, as Circuit Justice, granted appellant a preliminary injunction on July 11, 1959 is reported at 4 L. Ed. 2d 34, 80 S. Ct. 30 (1959). The opinion of the full Court, rendered June 20, 1960, directing the appellant to pursue an appeal in the Supreme Court of Alaska, is reported at 362 U.S. 555 (1960).

JURISDICTION

1. This suit was brought in the District Court of Alaska, after Alaska became a State but before it had established a permanent court system, to enjoin the enforcement of certain Alaska criminal statutes (17 SLA 1959 and 95 SLA 1959) which, as now interpreted, make it a crime for appellant and its members to erect, moor, maintain and operate fish traps within the Metlakatla Indian Reservation, even though they have express permission from the Secretary of the Interior to do so. An injunction was sought on the ground that the State statutes, as applied to appellant, are in conflict with various statutes, Executive Orders and regulations of the United States, and therefore, void under the Supremacy Clause of the United States Constitution.

From an adverse decision by the District Court, appellant took a direct appeal to this Court, pursuant to 28 U.S.C. § 1257(2). A question as to this Court's jurisdiction over the appeal was raised and was considered by this Court. Its decision was that the State District Court was the "highest court" of the State at the time the decision was rendered, and that jurisdiction, therefore, lay. Nonetheless, this Court abstained from deciding the merits of the controversy, which it characterized as "not free from doubt, to put it as its lowest." It did so in order to afford the newly constituted Supreme Court of Alaska, to which a precautionary appeal had been taken after it was constituted, to rule initially upon the questions presented. Directing appellant to seek relief in the Supreme Court of Alaska, this Court continued in effect the preliminary stay granted by Mr. Justice Brennan "until final disposition of the cases." The Court noted that "after the Alaska Supreme Court's decision there may be further proceedings on this appeal, and if it assumes jurisdiction, a further appeal may be taken from its judgment." 363 U.S. at 562.

2. The Alaska Supreme Court did assume jurisdiction of this case and affirmed the judgment of the District Court. Its judgment was entered on June 2, 1961, and a notice of appeal was filed in that Court on July 27, 1961.

3. The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1257 (1) and (2).

4. The following decision sustains the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal:

Metlakatla Indian Community v. *Egan*, 363 U.S. 555 (1960).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether the Alaska anti-fish trap law, 17 SLA 1959 and 95 SLA 1959, as applied to appellant's fishing in an exclusive Federal Reserve, is repugnant to the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358, to Presidential Proclamation No. 1332, 39 Stat. 1777, as ratified by the Act of May 7, 1934, 48 Stat. 667, to Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1959) and to regulations of the Secretary of the Interior issued thereunder, 25 C.F.R. Part 88, all of which authorize appellant to fish in the Metlakatla Reserve subject only to Federal control, and whether the Alaska statute, therefore, violates the Supremacy Clause of the United States Constitution.

2. Whether the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332 are invalid because they were repealed by implication by the Alaska Statehood Act.

3. Whether the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332, if they were not repealed, are unconstitutional in that they are beyond the powers of the Federal Government to enact and proclaim, respectively, and whether this Court erred when it upheld the Act of 1891 and the Presidential Proclamation in *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918).

4. Whether Section 4 of the Alaska Statehood Act, which provides that Indian trust property, including fishing rights, in Alaska, "shall be and remain under the absolute jurisdiction and control of the United

States," is unconstitutional in that it violates the Equal Footing Doctrine.

5. Whether Section 4 of the Alaska Statehood Act and the Alaska Omnibus Act, 73 Stat. 141, if construed as reaffirming the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332, are invalid because they have not received the express consent of the State of Alaska.

STATUTES INVOLVED

The provisions of the statutes, executive orders, and regulations involved are lengthy. The principal statutes, treaties, proclamations and regulations involved have previously been printed at pages 2 through 6 of the brief of Metlakatla Indian Community No. 326 OT 1959, (No. 2 OT 1961).

The following two statutes, not previously printed, are also involved:

(a) Sec. 2(a) Alaska Omnibus Act, 73 Stat. 141 (1959)

> Section 4 of the Act of July 7, 1958 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words "all such lands or other property, belonging to the United States or which may belong to said natives", and inserting in lieu thereof the words "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives."

(b) Sec. 3(b) of the Act of May 7, 1934, 48 Stat. 667

> The granting of citizenship to the Indians described in Section 3(b) of this title shall not in any manner affect the rights, individual or col-

lective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakatla Colony. Any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to the modification, alteration, or repeal by the Congress or the President, respectively.

STATEMENT OF THE CASE

The Metlakatla Indian Community is an Indian Tribe, organized under the provisions of the Indian Reorganization Act, 48 Stat. 987, as amended, 25 U.S.C. § 476. Its members are the Metlakatla Indians, who occupy the Annette Islands Indian Reservation. The Reservation was created by § 15 of the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358. This Court has held that the Reservation includes "the surrounding water", *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918). This surrounding area was defined by metes and bounds by Presidential Proclamation No. 1332, 39 Stat. 1777 (1916), which definition was ratified by Congress, 48 Stat. 607 (1934), and by this Court, *Hynes* v. *Grimes Packing Co.*, 337 U.S. 80, 112-114 (1949).

Salmon fishing with traps is the foundation on which the Community cannery, which employs hundreds of Metlakatlans, rests. As Justice Brennan pointed out in his opinion of July 11, 1959, granting a temporary stay:

> "The Indian members of this reservation with the financial support of the Federal Government have been engaged in trapping and canning operations since 1915, and such activity provides the only

means of support for substantially all of the inhabitants of the reservation. The Metlakatla Indian Community is obligated to make specific payments to the United States each year in repayment for facilities and equipment bought for its use by the Government. It relies on earnings from its fishing and canning operations to make these payments." 4 L. Ed. 2d at 35.

The present controversy arose out of the attempt by Alaska officials to enforce, within the confines of the Metlakatla Reservation, the Alaska anti-fish trap act, even though the Secretary of the Interior had expressly permitted the Community to maintain traps at four designated sites.

In February 1959 the State of Alaska enacted a general anti-fish trap law. 17 S.L.A. 1959. Two months later the law was modified to make explicit that it was not designed to conflict with Section 4 of the Alaska Statehood Act. 95 S.L.A. 1959. Nevertheless, State officials construed the law as applying to fishing by appellant within its exclusive reservation, and threatened to imprison members of the Community responsible for the maintenance of the traps (R. 13, 40). To enjoin the threatened invasion of its rights on the Reservation, the Metlakatla Indian Community initiated this suit.

The complaint alleged that ~~application of~~ the Alaska fish trap statutes as applied to appellant are "unconstitutional and invalid in that they are in derogation of and in direct conflict with, . . . applicable federal laws" (R. 16) and that "the action threatened by the defendants violates and is repugnant to, the laws of the United States and the Constitution of the State of Alaska," (R. 18). The appellee moved to

dismiss "on the ground that the complaint fails to state a claim upon which relief may be granted."

The District Court rejected appellant's contentions, holding, by inference, that Indian fishing rights are subject to State regulation; that any purported congressional limitation upon State control of Indian fishing would violate the "equal footing" doctrine; and that Indian fishing rights disappeared upon Statehood.

An appeal was taken to this Court, and, as previously noted, it abstained from deciding the case on its merits in order to afford the newly created Supreme Court of Alaska an opportunity to pass upon the issues. That Court, when called upon to rule, held that the Metlakatla water reservation disappeared when Alaska became a state. The opinion is not wholly clear. But it is apparent that the Supreme Court of Alaska (1) found Section 4 of the Statehood Act not to be a valid part of the compact of Alaska's admission to the Union, (2) found the Alaska Omnibus Act to be unconstitutional, (3) and found that the repeated Congressional and executive actions establishing, nurturing and preserving the reservation to have been mysteriously repealed or negated by Alaska's admission to the Union.

THE QUESTIONS ARE SUBSTANTIAL

The issues in this case go to the heart of our Federal system. Since 1891, Congress has repeatedly and deliberately acted to preserve the fishing rights of the Metlakatla Indians. Native rights were carefully considered by Congress during the struggle over Alaska Statehood. See e.g. H.R. Rep. No. 1731, 80th Cong., 2d Sess. 31 (1948); S. Rep. No. 1929, 81st Cong., 2d Sess. 1-2 (1950); H.R. Rep. No. 624, 85th Cong., 1st

Sess. 19 (1957). In view of the fact that Alaska natives were concerned that statehood might adversely affect their hunting and fishing rights, they requested and were assured that the *status quo* as to these rights would be preserved. This assurance was, in fact, written into the Act. Section 4, Alaska Statehood Act, 72 Stat. 339 (1958). After Statehood was achieved, the Secretary of the Interior issued regulations to define explicitly some of the rights protected by the Statehood Act. *Inter alia,* the regulations authorized the Metlakatla Indian Community to operate four fish traps. 25 C.F.R. § 88.2(e).

In spite of the action by both the legislative and executive branches of the Federal Government, the State of Alaska has attempted to regulate fishing by the Metlakatla Indian Community within its exclusive Fishery Reserve and has attempted to prohibit the operation of fish traps within the Reserve. In these attempts it has been sustained by the Alaska Supreme Court which went so far in invalidating Federal statutes that its decision, if followed to its logical conclusion, would mean that Metlakatla's land reservation evaporated with its water reservation and that the Metlakatlans are now squatters on the land on which they were born and have lived all their lives.

The Metlakatla Reservation was established by the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358 (1959), which set apart "the body of lands known as Annette Islands . . . to be held and used by [the Metlakatla Indians] in common under such rules and regulation, and subject to such restrictions as may be prescribed from time to time *by the Secretary of the Interior.*" (Italics supplied.) President Wilson, in 1916, defined the outer boundaries of the reservation, within

which appellant had the exclusive right to fish, as three thousand feet from the shore lines at mean low tide. This area was "to be used by [the Metlakatlans] under the general fisheries laws and regulations *of the United States . . .*" Pres. Proc. No. 1332, April 28, 1916, 39 Stat. 1777. (Italics supplied.) If this Presidential Proclamation required Congressional ratification, such ratification occurred with the Act of May 7, 1934, 48 Stat. 667. The validity of the reservation and its attendant fishing rights was affirmed by this Court in *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918), and reaffirmed in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949).

The foregoing statutes and proclamation would have survived Alaska's elevation to statehood even if native fishing rights had not been mentioned in the Alaska Statehood Act. They could not be held to have been repealed by implication. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832); *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *Squire* v. *Capoeman*, 351 U.S. 1, 7 (1956). However, the Statehood Act not only failed to repeal native fishing rights, it expressly reaffirmed them. Sec. 4, Alaska Statehood Act, 72 Stat. 339 (1958). Further reaffirmation is contained in the Alaska Omnibus Act, 73 Stat. 141 (1959).

All of the foregoing statutes, executive actions and even judicial decisions were stricken down by the Alaska Supreme Court. The ax used by the Court was wielded rather freely, declaring some Federal laws repealed by implication, questioning the constitutionality of others, including some which this Court has heretofore upheld. But it was a blunt ax, for it is difficult to determine from those pages of the opinion devoted to Metlakatla's appeal precisely what the

Court's holdings were. It would appear, though, that they can fairly be described as follows:

(1) The Act of 1891 and the 1916 Proclamation, in the State Court's view, were repealed by implication upon Alaska's achieving statehood. Just how it was done is not clear from the opinion. They simply seem to have faded away, or, as the Court put it, "did not survive Statehood". Appendix, p. 62a. This, the Court seems to have thought, was so because "[n]one of the facts which seemed to justify the creation of the exclusive right of fishery are now operative." *Id.*, p. 61a.

While the Court speaks only of the failure of the water reservation to survive, it is difficult to perceive how, in the absence of an express amendment, a part of a statute can have died and another part remained in effect. It would follow logically from the Court's opinion that the entire Act of 1891 must be discarded. The Supreme Court of Alaska has thus injected a new issue into this case which, at its lowest, casts serious doubts on Metlakatla's rights to its land as well as its exclusive fishery.

(2) If the Act of 1891 and the Presidential Proclamation had not evaporated with statehood, the Alaska Court seems to say, a serious question as to their constitutionality would arise. To quote the Court's words:

> "Whether Congress had the power to so subsidize an alien immigrant group, even though they were Indians, seems doubtful. The power of the President to create an exclusive fishery reservation for such a group seems even more doubtful." Appendix, p. 62a.

While the powers of the Congress and the President seem doubtful to the Alaska Supreme Court, they have

seemed clear to this Court, which has explicitly upheld the Fishery Reserve. *Alaska Pacific Fisheries* v. *United States, supra; Hynes* v. *Grimes Packing Co., supra.* The Alaska Court's pronouncement flies in the face of the holding of a unanimous Supreme Court of the United States, speaking through Mr. Justice Van Devanter, for many decades the country's foremost authority on Federal Indian law:

> "That Congress had power to make the reservation inclusive of the adjacent waters and submerged land, as well as the upland, needs little more than statement." *Alaska Pacific Fisheries* v. *United States, supra,* at 87.

Thus the Alaska Supreme Court has, in its decision, challenged not only the authority of the legislative and executive branches of the government of the United States, but of the judicial branch as well. A most serious question as to the Court's understanding of our Federal system is raised.

(3) With regard to the Alaska Statehood Act and more particularly Section 4 thereof, which preserves native fishing and hunting rights, the Alaska Supreme Court holds, in effect, that said section is a nullity because of its general, all-encompassing wording and "because of the affirmative duty imposed by the Alaska constitution [on Congress!!] to define any such reservation in the act of admission." Appendix, p. 61a. The Court thus holds that a State can impose on Congress a requirement that legislation take a particular form prescribed by the State or be null and void, even though Congress may be acting in a field in which its power is "plenary", *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, at 565 (1903), and "paramount and of a most sweeping character." *People ex rel. Ray* v. *Martin,*

294 N.Y. 61, 60 N.E. 2d 541, 545 (1945), aff'd. 326 U.S. 496 (1946). Once again it would seem that the Court has most seriously challenged the fundamental precepts of our Federal System.

(4) Even if Section 4 is not void for the foregoing reason, the Alaska Supreme Court found it to be invalid because it "withhold[s] sovereignty over its inland waters from a state in the absence of compelling reasons and without definitely describing in the act of admission the extent of the sovereignty intended to be withheld" and is thus "a violation of the equal footing doctrine." Appendix, p. 53a.

The Court thus betrays a fundamental misunderstanding of the constitutional doctrine of equality among the states. This Court has repeatedly held that the equal footing doctrine is not violated when a congressionally-imposed limitation upon a new state is attributable to some power of Congress other than its power to admit new states. (See e.g. *Coyle* v. *Smith*, 721 U.S. 559 (1911).)

(5) The Alaska Omnibus Act, 73 Stat. 141 (1959) is dismissed by the Alaska Court as another nullity because it lacked the assent of the State. As the Court views it, "the amendment forms no part of the compact between Alaska and the United States." Appendix, p. 20a. Once again the Court has seriously challenged the power of Congress to legislate in a field in which it has plenary jurisdiction.

(6) With regard to the basic, underlying authority of the United States to deal with the Indians of Alaska, the Court says:

> "The doctrine of *United States* v. *Kagama* has never been applicable to the Alaska Indian under

> United States rule. No Indian tribe, independent nation or power has been recognized in Alaska." Appendix, p. 39a.

This is said in the face of a stream of Federal assistance to the Indian population of Alaska, reaching back over decades, a stream of assistance of which Senator Gruening once said:

> "The extension of the economic and social benefits of the Indian reorganization act to Alaska has paved the way for the security of approximately one-half of the present population of the Territory, whose stabilized future is not only an essential act of humanitarianism but also an important item of wholesome advance." Annual Report of the Secretary of the Interior, 1936, at 30.

It is said in the face of special legislation for the Indians of Alaska, Act of May 1, 1936, 49 Stat. 1250, 25 U.S.C. § 475, the constitutional foundation for which lies in the "Indian commerce clause", United States Constitution, Art. I, Sec. 8, Cl. 3, which is the principal foundation for all Federal Indian legislation, Cohen, *Handbook of Federal Indian Law* (1945). It is also said in the face of explicit recognition of the Metlakatla Indian Community by the Secretary of the Interior, as evidenced by Secretarial approval, on August 23, 1944, of the Community Constitution and Charter under the Indian Reorganization Act. 48 Stat. 987-88, as amended, 25 U.S.C. §§ 476, 477.

The State Court's holding thus clashes sharply with the words of this Court in *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 419-420 (1866):

> "[I]t is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is

to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of congress. . . .

"Neither the Constitution of the state nor any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an act of Congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislation of the state the supreme law of the land, instead of the Constitution of the United States, and the laws and treaties made in pursuance thereof."

CONCLUSION

When this case was before this Court at the 1959 October Term, the Court appears to have reached the conclusion that the issues which constitute the basis of this controversy are so substantial as to require plenary consideration for their resolution. This was indicated first by the temporary stay granted by Mr. Justice Brennan, then by the Court's setting the case down for oral argument, and finally by the Court's opinion and its action in continuing the stay in effect. As the opinion of the Court stated:

". . . After the Alaska Supreme Court's decision, there may be further proceedings on this appeal; and if it assumes jurisdiction, *a further appeal may be taken from its judgment.*" 363 U.S. at 562 (Italics supplied.)

The decision of the Alaska Supreme Court has now greatly added to the number of substantial Federal

questions requiring resolution. Neither appellees nor the Court below followed the suggestion of this Court by developing a factual record which might sustain Alaska's invasion of an area of Federal responsibility. Instead the Court has returned this case with sweeping conclusions of law which seriously challenge the powers of the Federal Government. It would seem that the many years of struggle for Statehood and of dispute with the Federal bureaucracy have left their mark, for rarely has the highest court of a State gone so far in invading areas of Federal authority, in casting aside laws of Congress, a Presidential Proclamation, regulations of a cabinet officer, and even decisions of this Court, as has the Alaska Supreme Court in this case. The issues now go beyond the controversy between Metlakatla and the State and involve, in its broadest sense, the limitations imposed on the powers of a State by our Federal system.

Respectfully submitted,

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Date: September 25, 1961

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JAMES R. BROWNING, C

APPENDIX TO STATEMENT AS TO JURISDICTION
(Nos. 2, 3, and ——, O.T. 1961)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1961

No.

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE AND ORGANIZED VILLAGE OF KAKE, ET AL.,
Appellants,

v.

EGAN, GOVERNOR OF ALASKA, ET AL.,

On Appeal from the Supreme Court of the State of Alaska

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation; ORGANIZED VILLAGE OF KAKE; and ANGOON COMMUNITY ASSOCIATION, *Appellants,*

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees.*

On Appeal from the Supreme Court of the State of Alaska

APPENDIX TO STATEMENT AS TO JURISDICTION
(Nos. 2, 3, and ——, O.T. 1961)

STATUTES, ETC., INVOLVED

Statutes, treaties, proclamations and regulations involved have previously been printed at pages 2 through 6 of the brief of Metlakatla Indian Community No. 326 OT 1959, (No. 2 OT, 1961) and in Appendix to Brief of Kake and Angoon, No. 327 OT 1959, (No. 3 OT 1961).

APPENDIX

IN THE SUPREME COURT OF THE STATE OF ALASKA

File Nos. 21, 22 and 23

Opinion

[No. 42—June 2, 1961]

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation; ORGANIZED VILLAGE OF KAKE; and ANGOON COMMUNITY ASSOCIATION, *Appellants,*

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees.*

On Appeal from the District Court for the District (Territory) of Alaska,

First Judicial Division,
Raymond J. Kelly, Judge

Appearances: Richard Schifter, Washington, D. C., Theodore H. Little, Clarkston, Washington, N. C. Banfield, Juneau, Alaska, Attorneys for Appellant, Metlakatla Indian Community; John W. Cragun, Washington, D. C., N. C. Banfield, Juneau, Alaska, Attorneys for Appellants, Organized Village of Kake and Angoon Community Association; Ralph E. Moody, Attorney General of Alaska, and Douglas L. Gregg, Special Counsel to the Governor of Alaska, for Appellee; Perry W. Morton, Asst. Attorney General of the United States and Roger P. Marquis, Department of Justice, for the United States, as amicus curiae.

Before: Nesbett, Chief Justice, and Dimond and Arend, Justices.

NESBETT, Chief Justice.

These controversies arose out of the determination of the State of Alaska to prohibit the use of all fish traps for

the taking of salmon for commercial purposes in all the coastal waters of the state. Appellants contended that their fish traps were exceptions to the prohibitions contained in the constitution and laws of Alaska because their operation had been authorized by the Secretary of the Interior of the United States, who, they claimed, had the exclusive right to regulate fishing by Indians in Alaska. The United States District Court for the District (Territory) of Alaska in Juneau, on July 2, 1959, acting as an interim or transitional state court, dismissed appellant's suits to enjoin the state from enforcing acts making it a crime to erect, moor, maintain or operate a fish trap. That court denied appellants' motions for preliminary injunctions pending appeal to the Supreme Court of the United States. The Supreme Court of Alaska had not yet been organized. Mr. Justice Brennan, on July 11, 1959, granted a stay pending appeal to the United States Supreme Court.[1] On June 20, 1960, the United States Supreme Court in an opinion reserved decision on the merits of the appeals and directed appellants to pursue their dormant pending appeals in the then existing Supreme Court of Alaska in order to give that Court an opportunity to rule on questions open to it for decision.[2] This court has jurisdiction to hear appeals from final judgments concerning state matters rendered in the United States District Court for the District (Territory) of Alaska after January 3, 1959[3] and accepts jurisdiction of these appeals.

The historical basis for the attitude of the state toward fish traps as well as the nature of the fish trap itself will

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[1] Organized Village of Kake v. Egan, 4 L. ed. 2d 34, 80 S. Ct. 33 (1959).

[2] Metlakatla Indian Community v. Egan, 363 U.S. 555, 4 L. ed. 2d 1397 (1960).

[3] Hanover Fire Ins. Co. v. Bennett, No. 13, 348 P. 2d 587 (Alaska 1960).

be discussed briefly before attempting to deal with the many issues presented by these cases.

Since time immemorial Alaska has been blessed with a natural food resource in the form of annual migrations of salmon. From late spring until fall most of its fresh water rivers, and streams are, at one time or another visited by hordes of salmon that have migrated shoreward from the open sea. After periods varying from two to eight years at sea the homecoming salmon have increased in size from fingerlings to maturity and to weights ranging to sixty pounds and above in some species. As a life sustaining food the salmon is hardly excelled and because of its abundance in Alaskan waters it has always been one of the basic food resources of the people as well as the basis of their main industry. Responding to instinct the sea matured salmon seasonally form in huge schools in the sea enroute to the mouths of the fresh water rivers and streams they will soon enter. At a time dictated by instinct, but governed to some extent by water conditions and other factors, the schools then commence a mass movement from the sea toward the mouths of the rivers and streams. It is at this point in their migration that they are caught in great quantities by the fishing methods to be mentioned. Those escaping nets and traps proceed up the rivers and tributary streams to the place of their spawning where they in turn spawn and with few exceptions die.[4]

Harvesting some portion of this natural resource for food has always been an annual necessity for most of the native population and many of the white settlers. Commercial salmon fishing is the principal source of income for a large portion of Alaska's labor force. With the coming of the white man primitive methods of catching salmon gave way to what are generally considered the three most

[4] See Barnaby, Fluctuations in Abundance of Red Salmon of the Karluk River, Alaska 247-60 (Fishery Bulletin No. 39, 1944) (from 50 Fishery Bulletin of the Fish and Wildlife Service 237-95).

efficient methods. (1) gill nets—consisting of lengths of net strung between buoys secured to the tidelands floor by lines and stakes, with the nets usually going dry at low tide; (2) purse seines—where nets are maneuvered around congregations of fish in deep water by the use of powered boats; (3) fish traps—unquestionably the most productive method of catching salmon ever used. A trap consists of tall stakes or mechanically driven piling extending from the shore to varying distances seaward, depending on the depth of the water. Wire or webbing is stretched across the stakes or piling from the shore to the seaward end and from the ocean bottom upward to a point above high water. Located at the seaward end is an extended wing or hook and an opening into the heart and pot. When the webbing is on the ocean bottom fish cannot pass around the trap at the shoreward end. One tendency of migrating fish is to parallel the shoreline and travel with the incoming tide. Fish stopped by the webbing of a trap will eventually follow it seaward in an attempt to by-pass the obstruction. The wing or hook is constructed so as to discourage by-passing and divert the fish into the heart and pot where they remain. With some variations in construction, floating traps adapted to deep water are commonly used and are highly productive.

Public opposition to the trap appeared in Alaska when it became obvious that the fishery resource was being depleted.[5] Opponents claimed that traps wiped out entire schools of salmon headed for specific streams; that even when this did not happen they trapped an excessive percentage of the fish of a given school; that they trapped not

[5] Statistics contained in the International Yearbook Number of Pacific Fisherman, Jan. 25, 1961, p. 27, show that commencing with a total pack of 1,894,516 cases in 1905 the fisheries of Alaska were exploited to a peak pack of 8,454,948 cases of salmon in 1936. From 1936 onward the total pack gradually decreased to 1,778,339 cases in 1959, the lowest in the history of the industry. The total pack in 1960 was 2,550,027 cases.

only salmon but also fish of many other species, which, once trapped, died in the pot without being utilized for any purpose. Proponents, on the other hand, argued that the very efficiency of traps commended their use; that they produced a more marketable product because the fish were killed with less violence and reached the cannery sooner and fresher; and that the dwindling yearly salmon runs were the result of overfishing by all methods.

The authority granted to the Territory of Alaska by the Organic Act of 1912[6] did not extend to the regulation of fish and game. From 1906 until 1924 such regulation of the Alaska fisheries as occurred was directed by the Secretary of Commerce.[7] The White Act of June 6, 1924,[8] broadened the scope of the regulatory power. Under Reorganization Plan No. II in 1939 the responsibility for administering the act was transferred to the Secretary of the Interior.[9] The use of fish traps was permitted by regulation along specific areas of the coastline. The right to construct and operate a trap in any area declared to be available for trap fishing was open to all. Trap sites were never designated by the Secretary as belonging to any person or group prior to his granting of trap site privileges to appellants on March 7, 1959. The spacing between traps, and other regulations prescribed, resulted in limiting the number of trap site locations available within a given area. The legal prerequisites to operating a fish trap were that the trap be located in an area open to the use of traps, that the operator have a War Department permit to construct an obstruction to navigation, and after the Territory was organized, a fish trap license issued by the Territory

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[6] 37 Stat. 512, 48 U.S.C.A. § 24 (Supp. 1960) [§ 4-2-3 ACLA Cum. Supp. 1957].

[7] Act of June 14, 1906, ch. 3299, § 5, 34 Stat. 264.

[8] 43 Stat. 464, 48 U.S.C.A. § 221 (1952).

[9] 1939 Reorganization Plan No. II, 53 Stat. 1433.

of Alaska. The annual cost of constructing a trap varied between several thousand dollars for a hand driven stake trap to in excess of ten thousand dollars for a pile driven trap. The cost of construction and operation excluded the average Alaska fisherman from its use and in time the operation of fish traps became generally concentrated in the cannery operators and owners, it not being uncommon for a cannery corporation to own several dozen traps.[10] Fish traps were bought and sold. With few exceptions the right of the purchaser to annually erect and operate the trap on the tideland location previously occupied by the seller was not questioned by other persons because of a custom and usage observed by Alaska fishermen, that if the person who fished a given tideland location the previous year timely returned and prepared to fish that location the following year, his moral priority would be respected. Legally, all that could be sold was the apparatus and equipment used in the trap. Alaska courts have consistently held that no person could acquire a vested right in a tideland fishing location and that the first person to timely commence the erection of a trap was entitled to fish that location for that year, if the trap was completed and ready to fish on the opening day of the season.[11] The same customs were generally observed and the same law, with slight variations, governed with regard to gill net tideland fishing sites.[12] The only instance, prior to Statehood, of an acquisition by any person or group of an exclusive right to operate a fish trap in Alaska waters is that which came to the Metlakatla Indians through a combination of unusual circumstances, which will be discussed later in this opinion.

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[10] Gruening, The State of Alaska 395 (1954).

[11] Fisher v. Everett, 11 Alaska 1, 66 F. Supp. 540 (D. Alaska 1945); General Fish Co. v. Markley, 13 Alaska 700, 105 F. Supp. 968 (D. Alaska 1952); Thlinket Packing Co. v. Harris & Co., 5 Alaska 471 (D. Alaska 1916).

[12] Lind v. Markley, 13 Alaska 665, 105 F. Supp. 50 (D. Alaska 1952).

The very first session of the Alaska Territorial Legislature in 1913 memorialized Congress for legislation which would limit the fishing efficiency of the trap.[13] In 1913, 1915, and regularly thereafter, the Territorial Legislature memorialized Congress that no legislation be enacted whereby any right or title to any fish trap site in Alaska waters be granted.[14] In 1921 the Territorial Legislature memorialized Congress, attributing the diminishing salmon supply to the use of fish traps and requesting regulation of that method of fishing.[15] In 1924 Mr. Sutherland, Alaska's delegate to Congress, testified before a Congressional Committee during hearings on the White Act as follows:

> "... when the fish are congregated in one body moving toward the parent stream if by accident they come in contact with a trap lead and the lead fish enters the trap it is more than probable that the entire supply of that stream to the last fish is taken, and therefore a great many of the smaller streams in Alaska are barren of fish, and any number of men in Alaska will tell you by the method of the trap the entire supply is exterminated."[16]

The number of fish traps permitted under the Secretary's regulations ran into the several hundreds. Regular memorials to Congress recommending complete abolition of fish traps were passed by the Alaska Territorial Legislature commencing in 1931.[17] At least one unsuccessful at-

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[13] SLA 1913, Senate Joint Memorial No. 26, at 413.

[14] SLA 1915, Senate Joint Memorial No. 16, at 222.

[15] SLA 1921, House Memorial No. 1, at 181.

[16] 65 Cong. Rec. 5966 (1924).

[17] SLA 1931, House Joint Memorial No. 6, at 275, points out the prejudicial effect on the development of the Territory caused by the use of floating and standing fish traps and requests that the power to determine the methods to be employed in catching salmon be given to the Territorial Legislature.

tempt was made to tax the fish trap out of use.[18] In 1948 a referendum by the people of Alaska resulted in a vote of 19,712 to 2,624 in favor of abolition of fish traps.

On February 5, 1956, the Alaska Constitutional Convention adopted the Constitution of Alaska. Article VIII, section 15 stated:

> "No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

Ordinance No. 3 of that constitution dealt exclusively with fish traps and provided that each elector who voted on ratification of the constitution could, on the same ballot, vote for or against adoption of Ordinance No. 3, which prohibited the use of fish traps for the taking of salmon for commercial purposes in the coastal waters of the state. The ordinance provided that if it were adopted by a majority vote, then on the effective date of the constitution the following should become operative:

> "As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State."

The vote of the people of Alaska on April 24, 1956 was 21,285 to 4,004 in favor of adopting Ordinance No. 3.

On July 7, 1958, Congress passed the Alaska Statehood Act providing for the admission of Alaska into the Union.[19]

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[18] P. E. Harris & Co. v. Mullaney, 12 Alaska 476, 480, 87 F. Supp. 248 (D. Alaska 1949).

[19] 72 Stat. 339 (1958), amended by 73 Stat. 141 (1959).

Section 6(e)[20] of this act provided in part that the administration and management of the fish and wildlife resources of Alaska should be retained by the federal government, under existing laws, until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior had certified to the Congress that the Alaska State Legislature had made adequate provision for the administration, management, and conservation of the said resources in the broad national interest.

Alaska became a state on January 3, 1959.[21] The Alaska State Legislature met immediately thereafter and on February 25, 1959 a law became effective making it unlawful to erect, moor or maintain fish traps.[22] On March 7, 1959 the Secretary of the Interior issued an order prohibiting the use of fish traps in Alaska, to be effective on April 18, 1959,[23] but excluding fish traps at Metlakatla, Kake and Angoon as enumerated, a total of eleven traps. The order recited as its authority, section 1 of the White Act.[24] The

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[20] Quoted p. 48 infra. [p. 41a this appendix]

[21] Exec. Proclamation No. 3269, 24 Fed. Reg. 81 (1959).

[22] SLA 1959, ch. 17 (quoted p. 37 infra).

[23] 50 C.F.R. §§ 101.1-130.10 (Supp. 1960) (commercial fisheries regulations for Alaska).

[24] 43 Stat. 464 (1924), 48 U.S.C.A. § 221 (1952):

> "For the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of the Interior from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable."

Secretary's theory was that under section 6(e) of the Alaska Statehood Act[25] he was required to manage Alaska's fish and wildlife until the state took over that responsibility, that on January 3, 1959 when the act became effective, Ordinance No. 3 also became effective and required that he abolish all fish traps in Alaska since he was acting in a dual capacity as trustee-administrator to enforce the laws of the state and federal government. The Secretary interpreted the wording "under existing laws" in section 6(e) as including Ordinance No. 3, which, under his theory, amended the White Act. The Secretary's action and views were upheld.[26] The validity of his act in excluding appellants' traps from the effect of the order was not before the court.

On April 17, 1959 a comprehensive act establishing an organization for the management of Alaska's fish and game resources was enacted by the first state legislature.[27] On the same date an act prohibiting the operation of fish traps within the state, amending the previous act on fish traps[28] and prescribing penalties became effective.[29] On May 21, 1959 the Governor of Alaska wrote to the Secretary of the Interior pointing out that Ordinance No. 3 prohibited fish traps, native owned or otherwise, that the state legislature had made operation of fish traps a crime, that regulation 115.26 of the order of March 7, 1959, permitting fish traps on the tidelands or submerged lands of Alaska would impair the sovereign rights of the State of Alaska and that state officials had been instructed to enforce the constitu-

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[25] Quoted p. 48 infra. [p. 41a this appendix]

[26] Ketchikan Packing Co. v. Seaton, 267 F.2d 660 (D.C. Cir. 1959).

[27] SLA 1959, ch. 94.

[28] SLA 1959, ch. 17 (quoted p. 52 infra). [p. 44a this appendix]

[29] SLA 1959, ch. 95 (quoted p. 52 infra). [p. 44a this appendix]

tion and laws. He asked that the Secretary reconsider regulation 115.26.[30]

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[30] "May 21, 1959
Honorable Fred A. Seaton
Secretary of the Interior
Department of the Interior
Washington, D. C.

Dear Mr. Secretary:

"On March 7, 1959, you promulgated your amendments to the Alaska Fishery Regulation. Among the revision of regulations adopted was Section 115.26. The purpose of Section 115.26 Revised Regulation was to permit certain native owned or controlled fish traps to operate within Alaskan waters.

"Fish traps, native owned or otherwise, are prohibited by the Constitution of the State of Alaska:

'As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for [the] taking of salmon for commercial purposes is hereby prohibited in all [the] coastal waters of the State.'

"The Legislature of the State of Alaska has made operation of fish traps a crime within the State:

'Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or waters owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska.

'. . . .

'Sec[tion] 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed $5,000.00 or by both such imprisonment and fine.' (Chapter 95, SLA 1959)

"The will of the people of Alaska to rid our waters of fish traps has been demonstrated repeatedly. In every referendum

on the question, the Alaskan people have voted overwhelmingly to abolish the fish traps.

"When the matter was submitted last to the electorate on the adoption of the State Constitution, the returns indicated that Alaskans had in no manner receded from their position.

"In the 1948 referendum, the Village of Kake voted 123 to 6; Angoon, 41 to 9; and Metlakatla, 112 to 33; for abolition of fish traps. These are the several native villages where you would now permit fish traps. These villages voted more recently against fish traps when that issue was referred to the people of Alaska in 1956.

"Since becoming Governor of Alaska, I have repeatedly announced that fish traps will not be permitted within the waters of Alaska. I have made no exceptions. These announcements have been carried in the press.

"As chief executive of the State of Alaska, I must enforce the Constitution and laws of the State. Since no exception is made either in the Constitution or the statutes of Alaska, no discretion is conferred on the executive.

"The Court of Appeals for the District of Columbia Circuit, No. 15075, in *Ketchikan Packing Company, et al.* v. *Fred A. Seaton, et al.*, has this to say:

'The Secretary read the words "under existing laws" in the Westland proviso as including Ordinance [No.] 3 of Alaska, and concluded that the Statehood Act which "accepted, ratified and confirmed" the Alaska Constitution, amended the White Act by prohibiting the use of such traps in Alaskan waters as set forth in the ordinance. In other words, the Secretary argues that the Congress did not intend that he should suspend the Alaskan ordinance, adopted by popular vote along with the Constitution, in the interim period while he administered the state's wildlife resources.

'One key consideration in the problem is that we are dealing with a transition measure—a temporary, not a permanent, provision. What was the intention of Congress concerning the interim transition period between federal territorial control and full statehood? In effect, the Westland proviso makes the Secretary a "trustee" for both the federal government and the new state 'in [the] broad national interest" during the transition of administration from the federal to the state authorities. The Secretary, in that unique capacity, could not reasonably *disregard a valid law of Alaska* which was "existing" on January 3, 1959, the

On or about June 17, 1959 state officers arrested several persons and seized one trap on which pre-season work was

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effective date of the Alaska Statehood Act which defined his powers over wildlife resources for the interim period commencing on that date.' (emphasis supplied)

"In its conclusion, the Court said:

'Of necessity, in this unique interim situation, the Secretary must apply a federal sanction to effect the *enforcement of a state law.* See footnote 3 *supra.* This apparent anomaly can be explained only by reference to the fact that in this transition of authority the Secretary is operating in a duel capacity.' (emphasis supplied)

"I have considered Section 4 of the Enabling Act (Public Law 85-508) which refers to native property (including fishing rights). My legal advisors have informed me that this provision protects the vested rights of natives. At no time in the courts of Alaska or elsewhere has fishing by traps been held to confer a vested or a property right.

"The fish traps which would be permitted under Revised Regulation 115.26 must be placed upon the tidelands or the submerged lands of Alaska. Therefore, the Regulation would impair or infringe upon sovereign rights of the State of Alaska.

"For the reasons here stated, I must now advise that I will stand firm in my resolve that fish traps will not be allowed within Alaskan waters. I have instructed the appropriate officers in the State to see that the State Constitution and law is enforced. If Revised Regulaion 115.26 is left unchanged, it may mislead the native people who in reliance thereon may attempt to install or operate fish traps. I hope that loss of money and labor may be avoided. To that end, I ask that you reconsider Revised Regulation 115.26.

"I am convinced that continuing long term benefits far outweighing temporary gain will accrue to the very communities here involved by the early discontinuance of fish traps, and I submit to you that your announced intention last Fall to ban traps was applauded in these communities as it was elsewhere throughout Alaska.

"I shall be glad to discuss this matter with you personally or through authorized representatives at any time.

Sincerely yours,

William A. Egan
Governor of Alaska"

being performed. Actions for restraining orders were immediately commenced by appellants in the United States District Court for the District (Territory) of Alaska in Juneau.

After dismissal in that court, notices of appeal were filed with the Supreme Court of the United States on August 6, 1959. Notices of appeal were filed in this court as a precautionary matter after its organization. On February 19, 1960 an order was entered by this court holding all proceedings on the appeals in abeyance pending determination by the Supreme Court of the United States of the question of its jurisdiction over the appeals then pending in that court.

All three appellants contend that the Alaska constitution and statutes prohibiting fish traps are not applicable to them because, in adopting the constitution, the people of Alaska disclaimed right or title in or jurisdiction over Indian fishing rights and that the Alaska Statehood Act reserved absolute jurisdiction and control over Indian fishing rights to the United States.

Since most of the issues turn on the question of what rights Alaska disclaimed with respect to native fishing rights, we shall first address ourselves to that question in the knowledge that its answer will simplify solution of the other issues.

The road to Statehood for Alaska was long and difficult. The first bill providing for Statehood for Alaska was introduced in Congress in 1916. The first memorial to Congress from the Territorial Legislature petitioning for Statehood was passed in 1945.[31] Regular petitions were made thereafter without success. Finally in 1955 the Territorial Legislature provided for a constitutional convention.[32]

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[31] SLA 1945, House Joint Memorial No. 7, at 223; see SLA 1929, Senate Memorial No. 1, at 321.

[32] SLA 1955, ch. 45.

Elected delegates adopted a constitution on February 5, 1956 which was ratified by the people on April 24, 1956. This constitution served as a basis for subsequent petitions to Congress for Statehood and can be considered as an offer to accept the privileges and responsibilities of that status in accordance with its terms.[33] The disclaimer provisions relied upon by appellants are contained in sections 12 and 13 of article XII.[34]

Some two years and three months after the people of Alaska had adopted their constitution Congress passed the Alaska Statehood Act.[35] Section 1 provided that the State of Alaska would be admitted into the Union on an equal footing with the other states in all respects whatsoever, subject to the issuance of a proclamation required by section 8(c) of the act. Section 1 found that the Alaska con-

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[33] Boeing Aircraft Co. v. RFC, 25 Wash. 2d 642, 171 P.2d 838, 842, appeal dismissed, 330 U.S. 803, 91 L. ed. 1262 (1947).

[34] "Section 12. The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.

"Section 13. All provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people."

[35] 72 Stat. 339 (1958), amended by 73 Stat. 141 (1959).

stitution was republican in form, in conformity with the Constitution of the United States and the principles of the Declaration of Independence, "... and is hereby accepted, ratified, and confirmed".

Section 4 of the Alaska Statehood Act is a direct response by Congress to the provisions contained in the five sentences of section 12 of article XII of the Alaska constitution. The two sections constitute a compact between sovereigns.[36] For purposes of comparison, each sentence of section 12 of article XII of the Alaska constitution is separately quoted immediately above that portion of section 4 of the Alaska Statehood Act which represents Congress' response to that sentence:

> "The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union." (First sentence, section 12, article XII, Alaska Constitution.)
>
> "As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, ..." (Section 4, Statehood Act.)

A comparison of the offer with the response as above set forth indicates definite agreement as to the future status of United States property.

> "The State and its people further disclaim all right or title in or to any property, including fishing rights, the

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[36] Boeing Aircraft Co. v. RFC, supra note 33.

right or title to which my be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission." (Second sentence, section 12 of article XII, Alaska Constitution.)

". . . and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; . . .". (Section 4, Alaska Statehood Act.)

A comparison between the offer and response does not indicate definite agreement. The offer to disclaim by the state was conditioned on definition in the act of admission of the right or title to be disclaimed. The response merely repeated the offer to disclaim. It did not comply with the condition by defining the right or title.

"The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States." (Third sentence, section 12, article XII, Alaska Constitution.)

". . . that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation . . .". (Section 4, Alaska Statehood Act.)

The above offer and response indicate agreement as to property, without specific mention of fishing rights.

". . . *Provided,* That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect

any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act; . . .".

This portion of section 4 of the Alaska Statehood Act has no direct relation to any of the sentences of section 12 of article XII of the constitution.[37]

"They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress." (Fourth sentence, section 12 of article XII, Alaska Constitution.)

"This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation." (Fifth sentence, section 12 of article XII, Alaska Constitution.)

". . . And provided further, That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation." (Section 4, Alaska Statehood Act.)

The fourth and fifth sentences and the response appear to have sufficient definiteness to be offers and acceptances.

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[37] See one explanation of the reason for this proviso on page 37 of this opinion. [p. 31a this appendix]

Section 13 of article XII of the Alaska constitution is construed to be a blanket consent by Alaska to such proper reservations of rights or powers to the United States as may be contained in the act admitting Alaska to the Union.

The compact or contract between Alaska and the United States became effective upon approval of the terms of the Alaska Statehood Act by the voters of Alaska.[38] Section 8(b) of the Alaska Statehood Act required that three propositions be submitted to the qualified voters of Alaska. Only the third proposition is of interest here.[39] This proposition was approved by a vote of 40,739 to 7,500 on August 26, 1958. On June 25, 1959 Congress enacted the Alaska Omnibus Act. Section 2(a) amended that portion of section 4 of the Alaska Statehood Act which was a response to the third sentence of section 12, article XII of the Alaska constitution.[40]

Appellants argue that the amendment is a part of the compact and merely clarified the original intent of Congress. We cannot accept this reasoning. It is our view that the amendment forms no part of the compact between Alaska and the United States. It was not enacted until

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[38] Stearns v. State, 179 U.S. 223, 244-45, 45 L. ed. 162, 174 (1900).

[39] "(3) All provisions of the Act of Congress approved ..... reserving rights or powers to the
(date of approval of this Act)
United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people."

[40] Alaska Omnibus Act § 2(a), 73 Stat. 141 (1959) reads:

> Section 4 of the Act of July 7, 1959 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words 'all such lands or other property, belonging to the United States or which may belong to said natives', and inserting in lieu thereof the words 'all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives'."

ten months after the voters of Alaska had ratified the compact, six months after Alaska had attained Statehood, and three days after these controversies had arisen. This portion of section 4 reserves absolute jurisdiction and control in the United States. As originally enacted it applied only to "lands or other property". As amended, it purports to include fishing rights. In the portion of section 4 immediately preceding, fishing rights were parenthetically included. It is only logical to assume that if it had been intended that fishing rights be included in the section following, along with "lands or other property", the same phraseology would have been employed. The conciseness of and correlation between the pertinent sentences of the Alaska constitution and the responding portions of section 4 leave no room for the construction appellants urge.

What right or title to Indian fishing rights might the state have disclaimed under the terms of the second sentence of section 12, article XII and the responding portion of section 4, assuming there was a sufficient area of agreement to create a compact on this subject? The state offered to disclaim as to right or title "held" by or for the persons named. The response described the right or title as "held" by or for natives. There is no evidence of an intent on the part of either sovereign that any new or additional rights in fishing rights be established by the compact itself. The question then becomes one of what "right or title" to fishing rights was "held" at the time the compact was formed.

A review of all known legislation enacted by Congress since the purchase of Alaska from Russia that might have established a "right or title" in Alaska natives shows that Congress evidenced some concern for the natives by permitting them to kill fur seals for their needs,[41] and permit-

[41] Act of April 22, 1874, ch. 122, 18 Stat. 33; Act of April 6, 1894, ch. 57, § 1, 28 Stat. 52; Act of April 21, 1910, ch. 183, § 6, 36 Stat. 327; Act of Aug. 24, 1912, ch. 373, § 3, 37 Stat. 500; Act of Feb. 26, 1944, ch. 65, § 3, 58 Stat. 101.

ting them, along with miners, prospectors, explorers and travelers, to kill game out of season when in absolute need of food and no other food was available.[42] The Act of May 17, 1884,[43] establishing a civil government in Alaska provided:

> "... That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

This provision was not confined to Indians. The first act of Congress with respect to fisheries in Alaska was passed on June 14, 1906,[44] making it unlawful for a non-citizen, or one who had declared his intention but was a non-resident, or any company not organized under the laws of the United States or of a state, or any person not a native of Alaska, to catch fish except with rod, spear or gaff. In the same year the first act to regulate commercial fisheries was passed.[45] This act taxed fishing enterprises, exempting those who operated hatcheries for restocking, restricted the use of nets and seines, provided for closed periods and penalties for violations, but made no mention of the natives.

Section 1 of the White Act[46] stated that its purpose was that of "... protecting and conserving the fisheries of

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[42] Act of June 7, 1902, ch. 1037, § 1, 32 Stat. 327, as amended by Act of May 11, 1908, ch. 162, § 1, 35 Stat. 102; Act of Jan. 13, 1925, ch. 75, § 10, 43 Stat. 744, as amended by Act of Feb. 14, 1931, ch. 185, § 10, 46 Stat. 1113 (exemption from license requirement), as amended by Act of June 25, 1938, ch. 686, § 4, 52 Stat. 1171.

[43] Ch. 53, § 8, 23 Stat. 25.

[44] Ch. 3299, 34 Stat. 263.

[45] Act of June 26, 1906, ch. 3547, 34 Stat. 478.

[46] Ch. 272, 43 Stat. 464 (1924), 48 U.S.C.A. §§ 221-222 (1952).

the United States in all waters of Alaska. . . ." The Secretary of Commerce was required to regulate the fisheries,

> "*Provided,* That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, *nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce.* . . ." (Emphasis added.)

The emphasized portion of the above quoted section was generally the law of Alaska prior to enactment of the White Act.[47] This section precludes the possibility that the Secretary might have created any rights in natives subsequent to its enactment in 1924. On the only occasion that the Secretary of the Interior ever attempted to create an exclusive right of fishery in Alaskan Indians, with the exception of the cases under consideration, the United States Supreme Court said through Mr. Justice Reed:

> "It would take specific and unambiguous legislation to cause us to rule that Congress intended to authorize the Secretary of the Interior to alienate the Alaska fisheries permanently from public control."[48]

In 1934 Congress, by amendment of earlier acts, permitted the taking of king salmon in the Kuskokwim and Yukon rivers for commercial purposes, but limited such taking to Indians and bona fide white inhabitants.[49]

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[47] Tlingit Packing Co. v. Harris, 5 Alaska 471 (D. Alaska 1916).

[48] Hynes v. Grimes Packing Co., 12 Alaska 348, 370-71, 337 U.S. 86, 105, 93 L. ed. 1231, 1248 (1949).

[49] Act of April 16, 1934, ch. 146, § 1, 48 Stat. 595.

Our search leads us to the belief that no act of Congress had established any "right or title" in fishing rights which were "held" by or for natives at the time the compact was made. Whatever hunting or fishing privileges Congress has extended to natives in the past have been equally applicable to the white residents. Natives and whites have always fished as equals in Alaska. This is understandable and is as it should have been. A remote wilderness could never have been populated to any extent with permanent white residents if they had not been accorded at least an equal opportunity with the natives to obtain subsistence from the fish and game resources. This policy and the basic reasoning is still applicable to a substantial portion of the state. The white settlers of innumerable communities and settlements in Alaska would be immediately forced to give up residence if they were not permitted to hunt and fish with the natives as equals. Such equality has not worked to the disadvantage of the native. Wherever the white man has introduced modern equipment or methods, the native has quickly adapted them to use in his environment with as great, if not a greater, facility than the white resident of the same area. Fish traps, however, are an exception. Neither the native nor the permanent white resident of Alaska has ever owned fish traps to any extent. The original cost of construction plus payroll and maintenance effectively precluded them. Though traps have been the most effective means of commercial exploitation of the fisheries, their use did not seem to be important to the seasonal efforts of the natives or the white residents to acquire a subsistence from the fisheries until the supply began to be seriously depleted. Of course, the controversies before us extend beyond that of a right to fish for mere subsistence. The right alleged to have been disclaimed by the state and reserved to the United States is said to be extensive enough to permit the Secretary of the Interior to authorize wholesale commercial exploitation of the fisheries by the use of traps.

We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States by the second sentence of section 12 of article XII of the Alaska constitution and the responsive portion of section 4 of the Alaska Statehood Act. This is because no fishing rights were defined, as required by the condition in the offer to disclaim, and no fishing rights were "held" by or for natives at the time.

Appellants say the claimed reservation to the United States of absolute jurisdiction and control over Indian fishing in Alaska by section 4 of the Alaska Statehood Act, as amended, transcends the police power of the state under the supremacy clause of the United States Constitution; that it does not violate the equal footing doctrine and is a legitimate exercise of Congress' power to regulate commerce with the Indian tribes.

The power of a state to control and regulate the taking of game within its borders was recognized by the Supreme Court of the United States in *Geer* v. *Connecticut*.[50] After reviewing the Civil and English common law, that court found the power to be an attribute of government, recognized and enforced by the common law of England, present in the colonial governments where not denied by charters and passed on to the states where it remains. In defining the power the court said:

> "Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of

[50] 161 U.S. 519, 40 L. ed. 793 (1896).

> private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in *Martin* v. *Waddell*, 41 U.S. 16 Pet. 410 [10:1012], represents its people, and the ownership is that of the people in their united sovereignty. The common ownership, and its resulting responsibility in the state, are thus stated in a well considered opinion of the supreme court of California: 'The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic and commerce in it, if deemed necessary for its protection or preservation, or the public good.' Ex parte Maier, *ubi supra* [103 Cal. 476].'"[51]

The abolition of fish traps by a state in the exercise of its police power is not new to the law. In upholding an act of the New York legislature which abolished fish pounds in 1883 the Supreme Court of the United States said through Mr. Justice Brown:

> "The duty of preserving the fisheries of a state from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food.
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> ". . . The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future."[52]

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[51] Id. at 529, 40 L. ed. at 797.

[52] Lawton v. Steele, 152 U.S. 133, 139, 38 L. ed. 385, 389 (1894).

A Maryland statute prohibiting purse seining for menhaden within three miles of its shores for conservation reasons was upheld as a valid exercise of its police power under the Submerged Lands Act.[53] The complete abolition of traps for the taking of salmon, with the exception of the traps here in controversy, was upheld in *Ketchikan Packing Co.* v. *Seaton*.[54]

The absolute jurisdiction claimed to be reserved in the United States is the right to regulate and control all fishing by Indians anywhere in Alaska. There are natives in all parts of Alaska. Approximately 42 per cent of the fishing population reported in the 1950 census were natives. If the full scope of the claimed power were eventually exercised by the Secretary of the Interior, only permanent chaos and conflict could result. The magniture of the power claimed is such that the effect could be to render useless or futile any effort by the state to regulate. In *New York ex rel. Kennedy* v. *Becker*,[55] the Supreme Court of the United States said of a situation where it was proposed that the interpretation of a treaty with the Seneca Indians be that the state would regulate fishing by the whites, on lands not on the Seneca reservation, but previously ceded by them, and the Indian tribe would regulate its members:

> "It is said that the state would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty, instead of maintaining in each the essen-

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[53] Corsa v. Tawes, 149 F. Supp. 771 (D. Md.) (3-judge court), aff'd mem., 355 U.S. 37, 2 L. ed. 2d 70 (1957).

[54] 267 F. 2d 660 (D.C. Cir. 1959). See also Dow v. Ickes, 123 F.2d 909 (D.C. Cir. 1941), cert. denied, 315 U.S. 807, 86 L. ed. 1206 (1942).

[55] 241 U.S. 556, 60 L. ed. 1166 (1916).

tial power of preservation, would in fact deny it to both.'"[56]

The reasoning of *New York ex rel. Kennedy* v. *Becker* is particularly applicable to the cases before us. The salmon from the sea that pass by the islands upon which appellant communities are located are bound for the many fresh water streams that empty into the inland waters, not only from the islands, but from the mainland coast of Southeastern Alaska as well. They are not the product, for the most part, of the fresh water, streams near where they are caught. The schools, in many instances, still have many miles of inland sea and fresh water to traverse before they reach the stream or lake bed where they were spawned. Control of fishing, by enforcement officers advised by biologists experienced in the escapement requirements of each spawning area, is an absolute necessity if preservation and re-building of the depleted runs is to be accomplished. Each main school is generally identified by the biologists as to species, spawning destination and other characteristics. Stream escapement counts are maintained as well as a current count of the catch. The amount of commercial fishing permitted within the run of a given species destined for a given area is regulated, during the run, by trained officials governed by one central policy.[57] Dual regulation is impracticable. These migrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the people of the state, and the obligation and authority to equitably and wisely regulate the harvest is that of the state.

The Secretary authorized appellants to fish with eleven traps in 1959. The number of traps he will authorize in

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[56] Id. at 563, 60 L. ed. at 1171-72.

[57] See Davidson & Christey, The Migration of Pink Salmon in the Clarence and Sumner Straits Regions of Southeastern Alaska (Bureau of Fisheries Bulletin No. 25, 1938) (from Bulletin of the Bureau of Fisheries 643-66).

future years and their locations will depend upon factors paramount to him. Under the power claimed the number could be without limit and in any area, as long as the right was exercised in behalf of Indians. It has not been unusual for a single trap to catch as many as 600,000 fish in a single season.[58] The impact of the catch of eleven traps on the fisheries of Southeastern Alaska is considerable from the point of view of conservation. The season's catch of a gill net or purse seine fisherman in the same area might run from 2,000 to 10,000 fish respectivley. The discrimination against all fishermen, natives and whites alike, resulting from the Secretary's 1959 regulation, creates social problems for the state which it is powerless to remedy if the Secretary's claimed right is upheld. The intention to retain such a power over the basic industry of the state was not intimated in the wording of the Alaska Statehood Act, much less described. Such a power has never been reserved as to any other state admitted into the Union as far as this court is aware. The fisheries of Alaska, although pitifully depleted, are still its basic industry. The economy of the entire state is affected, in one degree or another, by the plenitude of the salmon in a given season. The preservation of this natural resource is vital to the state and of great importance to the nation as a whole. The law is so well settled that it can provoke no argument to state that as a general welfare measure a state can prohibit the use of traps for the taking of fish. Ordinance No. 3 is a welfare measure. Its objects are stated to be the relief of economic distress among fishermen, to conserve the dwindling supply of salmon and insure fair competition in commercial fishing. Alaska had every right to adopt such a policy, applicable to natives and whites alike, unless its police power with respect to natives while fishing had been rightfully curtailed.

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[58] Alaska Pac. Fisheries v. United States, 4 Alaska Fed. 709, 248 U.S. 78, 63 L. ed. 138 (1918).

In *Ward* v. *Race Horse*[59] the Supreme Court of the United States decided that a treaty between the United States and the Shoshonees and Bannock tribes which provided that those Indians " '. . . shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon . . .' "[60] gave way to the equal footing doctrine. The right given to the Indians was found to be repugnant to the rights of Wyoming, admitted into the Union after the treaty. Race Horse had killed seven elk on unoccupied land belonging to the United States, not within his reservation, but in violation of the game laws of Wyoming. This decision, in unequivocal terms, decided that if the treaty were upheld, Wyoming would be without a power possessed by all states, that of regulating the killing of game within its borders. It was argued that since the United States had the right under the Constitution to regulate commerce with the Indian tribes, it therefore had the right to exempt specific property owned by it from the game laws. The court observed that the enabling act was silent as to the reservation of any rights in favor of the Indians and that even though Congress had full authority to charge the territory with such burdens, which would continue after admission, it had not expressly done so. Race Horse had not violated any of its terms, but the treaty was required to give way to the rights of the State of Wyoming. In the act setting up a temporary territorial government for Wyoming, Congress had provided that nothing in the act was to impair "the rights of persons or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians".[61] The act of admission contained no exception in favor or for the benefit of the Indians. These

[59] 163 U.S. 504, 41 L. ed. 244 (1895).

[60] Id. at 505, 41 L. ed. at 245.

[61] Ibid., quoting 15 Stat. 178 (1868).

circumstances are mentioned by appellants as distinguishing *Race Horse* from the cases at bar, because of the disclaimer provisions in the Alaska constitution and the wording of section 4 of the Alaska Statehood Act. Persuasive against such a classification of *Race Horse* is the fact that Alaska in its constitution offered to disclaim only as to fishing rights defined in the act of admission. No Indian fishing rights were defined in the act and none were held by or for them. The treaty of the United States with the Shoshonees was the law of the land at the time of Wyoming's admission and conceivably could have been construed as binding on Wyoming although not specifically mentioned in the act of admission, had it not been found to be inferior to Wyoming's right to be admitted on an equal footing with the other states of the Union. The court specifically stated that it was influenced by the obvious intent of Congress, expressed indirectly by failing to mention any reservation.[62]

We are advised by the United States' brief, submitted as a friend of the court, that the term "(including fishing rights)" was written into section 4 over the objection of the Department of Justice and that as a result, that department then insisted that the first proviso be added in order to make doubly certain that no compensable rights in favor of Indians were being established or recognized[63]. The brief further states that in the view of the United States the "fishing rights" reserved were not true property rights, but merely fishing privileges. With that view

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[62] 163 U.S. at 515, 41 L. ed. at 248.

[63] The United States' brief refers to the original draft and that portion of section 4 which is a response to the second sentence of section 12 of article XII of the Alaska constitution. The term "(including fishing rights)" was also added to the following portion of section 4 which is a response to the third sentence of section 12 of article XII of the Alaska constitution but this was not done until June 25, 1959. See pages 20, 21, of this opinion. [pp. 17a, 18a of this appendix]

Race Horse becomes even more persuasive and leaves no doubt as to the direct course the court would have taken in deciding the case if an undefined fishing privilege had been involved rather than a specific hunting right secured by treaty.

Appellants rely on *United States* v. *Sandoval*[64] and *United States* v. *Kagama*[65] as precedent for the argument that Congress' power to regulate commerce with Indian tribes extends to the Indians of Alaska.

In *United States* v. *Sandoval*, the enabling act for New Mexico required the state constitutional convention to provide by ordinance against the introduction of liquor into Indian country, which was defined as including all lands then owned or occupied by the Pueblo Indians of New Mexico. An act of Congress in 1897 had already prohibited the introduction of liquor into the area. The question was whether the enabling act requirement violated the equal footing doctrine. The court cited with approval that portion of the holding in *Coyle* v. *Smith*[66] stating that any regulation provided for in an enabling act concerning commerce or commerce with Indian tribes will derive its force, not from the compact with the proposed new state, but solely because the power of Congress extended to the subject. In holding that the twenty pueblos scattered over the state were subject to the prohibition and that neither the Act of 1897 nor the enabling act was a violation of the equal footing doctrine,[67] the following factors were specifically considered by the court as proof that Congress

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[64] 231 U.S. 28, 58 L. ed. 107 (1913).

[65] 118 U.S. 375, 30 L. ed. 228 (1886).

[66] 221 U.S. 559, 55 L. ed. 853 (1911).

[67] At 231 U.S. at 49, 58 L. ed. at 115, the court said:

"... [T]he legislation in question does not encroach upon the police power of the state, or disturb the principle of equality among the states."

had the power under the constitution to regulate the Pueblos and had historically exercised it:

1. The lands comprising the pueblos were held by them in communal fee simple under grants from the King of Spain later confirmed by Congress.

2. The peoples lived in isolated communities under primitive conditions and were governed chiefly by crude customs inherited from their ancestors.

3. It was questionable whether they were United States citizens.

4. They had been historically treated as wards of the United States—were furnished with the implements of civilization, were provided with training schools and an attorney to represent their interests, and were exempt from taxation.

5. They were forbidden by New Mexico law from voting except for the election of overseers of irrigation ditches and of the officers of their pueblos.

6. The Constitution authorized Congress to regulate commerce with the Indian tribes and historically it had exercised a fostering care over all dependent Indian communities within United States borders.

7. The court approved the doctrine of *United States* v. *Kagama*.

8. Congress had a right to determine for itself when guardianship which had been maintained over the Indians should cease.

9. From 1854 onward the United States had treated the Pueblos as other Indian tribes in the United States.

The Court stated, however:

> "Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an In-

> dian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." [68]

In comparing the facts of the past and present status of the Indians of Alaska with those considered controlling in *Sandoval* we find the following:

1. No land encompassing Indian fishing rights, or otherwise, is held by any Indians in Alaska in communal fee simple. The United States has never entered into any treaty or similar type agreement with any group of Indians in Alaska. There are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law. No permanent reservations have ever been created for Indians in Alaska.

2. The villages of Kake and Angoon are populated largely by people of Tlingit Indian ancestry. They are not located on temporary reservations. The Tlingits occupied the greater part of what is now known as Southeastern Alaska at the time of the coming of the Russians. They spoke a single language. Organizationally they consisted of two large moieties, each moiety consisting of numerous clans. There was no tribal organization as that term is generally understood although they lived under a definite social structure.[69] They adapted quickly to the white man's way of life and long ago discarded primitive customs which served no useful purpose. The City of Kake was incorporated as a first class city under territorial law in 1952 and governs itself with an elected mayor, council and school-board. The Village of Angoon was incorporated under territorial law many years ago and governs itself

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[68] 231 U.S. at 46, 58 L. ed. at 114.

[69] Tlingit & Haida Indians of Alaska v. United States, 177 F. Supp. 452, 454-55 (Ct. Cl. 1959).

in much the same fashion. Both communities were provided with public schools by the territory and now are by the State of Alaska.

3. Some ancestors of the present residents of Kake and Angoon may have acquired citizenship under the Treaty of Cession with Russia in 1867;[70] all had the opportunity to acquire citizenship under the Act of February 8, 1887, which provided for the allotment of land to Indians as a means of obtaining citizenship[71] where they did not reside on reservations. An additional means of obtaining citizenship was afforded them in 1906.[72] In the second session of the Territorial Legislature in 1915 every native Indian was again given the privilege of becoming a citizen.[73] All Indians born within the territorial limits of the United States were declared to be citizens of the United States in 1924.[74] The Metlakatlans were granted citizenship by Congress in 1934.[75]

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[70] Act of June 20, 1867, art. III, 15 Stat. 539, in pertinent part provides:

> "Citizenship of inhabitants; Uncivilized tribes. The inhabitants of the ceded territory . . . may return to Russia . . . but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens. . . . The uncivilized tribes will be subject to such laws and regulations as the United States, may from time to time, adopt in regard to aboriginal tribes of that country." See in Re Minook, 2 Alaska 200 (D. Alaska 1905).

[71] Ch. 119, 24 Stat. 388, as amended by ch. 868, 31 Stat. 1447 (1901), ch. 2348, 34 Stat. 182 (1906).

[72] Act of May 8, 1906, ch. 2348, 34 Stat. 182.

[73] SLA 1915, ch. 24.

[74] Act of June 2, 1924, ch. 233, 43 Stat. 253 (now covered by 8 U.S.C.A. § 1401 [1952]).

[75] Act of May 7, 1934, ch. 221, 48 Stat. 667 (now covered by 8 U.S.C.A. § 1401 [1952]).

4. Neither the residents of Kake and Angoon nor their Tlingit ancestors have ever been treated as wards of the United States. The implements of civilization, such as guns, boats, outboard motors, nets, clothing, and home building materials, useful in their economy were quickly acquired by them from the white man and adapted to their use. Certain assistance has been given to appellant communities under the Act of May 1, 1936,[76] which provided that certain sections of the Wheeler-Howard Act[77] would apply to Alaska, to groups of Indians not theretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district. These groups were permitted to organize, adopt constitutions and by-laws and receive charters of incorporation and federal loans under the Wheeler-Howard Act. None of the Indians of appellant communities have ever been exempt from taxation by the Territory or State of Alaska. Secretary of Agriculture Benson had the following to say in 1954 concerning the mode of life of the Indians of Southeastern Alaska:

> "The mode of life for the southeast Alaskan Indian is much the same as that of the whites. The Indians live either in villages of their own or in the principal towns such as Craig, Juneau, Ketchikan, Petersburg, Sitka, and Wrangell . . . The Indian lives in the same type of residence as the white man, wears similar clothes, and eats similar food. He is a citizen and a voter. He works along side of and in competition with white citizens at the available local vocations. Both Indians and whites take wood for domestic purposes from national forest land (Without permit or payment) but otherwise make little use of the forest areas. Fishing for food is done in saltwater, not in the fresh water streams. Both white men and Indians trap

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[76] 49 Stat. 1250, 25 U.S.C.A. § 473a (Supp. 1960).

[77] 48 Stat. 984 (1934), as amended, 25 U.S.C.A. §§ 461-79 (Supp. 1960).

and hunt over the same areas. The Indians adjustment to the white man's way of life is about complete." [78]

In 1952 the following judicial comment was made on the same general subject:

". . . [T]he Indians of Southeastern Alaska, and particularly the Haidas, have not only abandoned their primitive ways and adopted the ways of civilized life but are now fully capable of competing with the whites in every field of endeavor . . . . It is a matter of common knowledge that today the Indians of Southeastern Alaska prefer the white man's life despite all of its evils and shortcomings."

". . . . Whatever may be said in justification of reservations in the unsettled regions of Alaska, they are viewed as indefensible in Southeastern Alaska, and generally condemned by whites and Indians alike as racial segregation and discrimination in their worst form." [79]

Amalgamation of the natives with the whites commenced at an early date and comparable progress has been made in other regions of Alaska as well.[80]

5. In providing for the organization of the Territory of Alaska in 1912 Congress defined the right to vote and

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[78] Brief for Appellee pp. 60-61, quoting from Report of Secretary of Agriculture Benson to Chairman, Committee on Interior and Insular Affairs, Jan. 11, 1954 (see Committee on Interior and Insular Affairs, 83d Cong., 2d Sess., Supplemental Reports of Jan. 11, 1954 on H.R. 1921, at 5-6).

[79] United States v. Libby, McNeill & Libby, 14 Alaska 37, 41, 42, 107 F. Supp. 697, 699 (D. Alaska 1952).

[80] See In Re Minook, 2 Alaska 200 (D. Alaska 1905).

made no exception as to natives.[81] The Indians of Alaska have not only exercised their voting privileges but have held many high elective offices. Of the sixty members of the first state legislature, nine were natives. The president of the Senate, Senator William Beltz, was an Eskimo. Senator Frank Peratrovich, of Tlingit ancestry, elected at large from the Southeastern District, which includes all of appellant communities, succeeded Senator Beltz as President of the Senate. Senator Peratrovich was a delegate to the Constitutional Convention. Senator Peratrovich's election district is composed of 78.3 per cent whites.[82] In certain areas of Alaska the final outcome of an election can never be predicted until delayed returns from outlying precincts populated largely by Indians, Eskimos and Aleuts have been received.

6. As contrasted with the finding of the court in *Sandoval*, Congress has not historically exercised a fostering care over the communities of Kake and Angoon, nor over their Tlingit ancestors, nor in fact over any of the Indians of Alaska. They were left to make a natural adjustment with the white man and have done so with astonishing ease and thoroughness. It is believed that anything resembling a communal type organization in appellant communities is recent and exists in form to comply with the loan requirements of the Wheeler-Howard Act.[83]

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[81] The Organic Act of August 24, 1912, ch. 387, § 5, 37 Stat. 513, provided that the qualifications of electors should be the same as those provided in the Act of May 7, 1906, ch. 2083, § 3, 34 Stat. 170, which provided:

> "Sec. 3. That all male citizens of the United States twenty-one years of age and over who are actual and bona fide residents of Alaska, and who have been such residents continuously during the entire year immediately preceding the election, and who have been such residents continuously for thirty days next preceding the election in the precinct in which they vote, shall be qualified to vote for the election of a Delegate from Alaska."

[82] Rogers, Alaska in Transition 55 (1960).

[83] Pp. 42 and 43 supra. [p. 36a this appendix]

7. The doctrine of *United States* v. *Kagama* has never been applicable to the Alaskan Indian under United States rule. No Indian tribe, independent nation or power has been recognized in Alaska. Crimes committed by Indians in Alaska have always been punished by the territorial and state courts.[84] There is not now and never has been an area of Alaska recognized as Indian country with one possible exception.[85] An oft quoted portion of the *Kagama* opinion states:

> "These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."[86]

This is almost, sentence by sentence, the exact reverse of the history of the status of the Indian in Alaska since its purchase in 1867.

8. Since Congress has never maintained any guardianship over Alaska Indians, to argue that its guardianship will terminate when Congress itself so determines, has no meaning.

9. Since Congress has never recognized any Indian tribe, nation or power in Alaska, nor treated the na-

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[84] United States v. Booth, 17 Alaska 561, 161 F. Supp. 269 (D. Alaska 1958).

[85] See Petition of McCord, 17 Alaska 162, 151 F. Supp. 132 (D. Alaska 1957). This case stands alone in this area of Alaska law and has been distinguished in United States v. Booth, 17 Alaska 561, 567-68, 161 F. Supp. 269 (D. Alaska 1958).

[86] 118 U.S. at 383-84, 30 L. ed. at 231.

tives as wards in the usual meaning of that term, the historical factor relied on in *Sandoval* is entirely absent from this case.

The broad policy of the United States in its control of federal-Indian relations, as outlined by the United States in its brief, was first to reserve areas for the use of the Indians, to the complete exclusion of whites and of state law. This policy later provided for modified amalgamation with the white population by the allotment process and permissive application of state law to a limited degree, subject always to federal controls for the protection of the Indians. But this is not the history of federal-Indian relations in Alaska. The application of such a policy has never been necessary. Amalgamation has occurred peacefully and naturally. Adaptation to the white man's civilization has been willing and quick and in direct contrast to that made by many tribes in other parts of the United States. We do not mean to imply that the United States has not assisted in the process, for it has. In the fields of health and education, and economically in many instances, it has rendered and continues to render humane and valuable assistance to the natives of Alaska. What we do say is that most of the facts which created the Indian law authority relied on by appellants are absent from this case.

When Congress passed the Alaska Statehood Act it was well aware of the right of a state to regulate the taking of game within its borders and we believe that it intended that all such jurisdiction then being exercised by the Secretary of the Interior under various acts of Congress be transferred to the State of Alaska as soon as it was prepared to assume this responsibility. Section 6(e) of the Alaska Statehood Act provided that all real and personal property of the United States specifically used for the sole purpose of conservation and protection of the fisheries and wildlife was to be transferred to Alaska. It

further provided that administration and management of the fish and wildlife under existing laws be retained by the federal government only until the Secretary of the Interior had certified to Congress that the Alaska State Legislature had made adequate provisions for the administration, management and conservation of such resources in the broad national interest.[87] This section, in our view, expressed Congress' intent that all control over the management of the fish and wildlife resources of the state be given to the state, along with the property belonging to and then being used by the United States solely for such management. If there had been an intent that the Secretary of the Interior continue to exercise jurisdiction and control over all Indian fishing in Alaska it would have been expressed in this section.

It is considered significant that the temporary administration by the Secretary was to be according to the

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[87] The pertinent wording of section 6(e) reads as follows:

"(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301, 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries law of June 26, 1906 (34 Stat. 478; 48 U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: Provided, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest. . . ." 72 Stat. 340 (1958).

provisions of the Alaska game laws of July 1, 1943[88] and under the Alaska commercial fisheries laws of June 26, 1906[89] and June 6, 1924,[90] the latter being commonly known as the White Act. There is no intimation of an intent that any administration under these laws be carried out after the state had been certified as capable of its own management. The provision is that such management and control be retained by the federal government "under existing laws *until*" [emphasis added] the state legislature had made adequate provisions of its own. Such certification was made by the Secretary of the Interior on April 27, 1959 and Alaska assumed control and management of its fish and wildlife resources on January 1, 1960. At the time there controversies arose, however, the Secretary was administering Alaska's fish and wildlife resources for the interim period provided for in section 6(e).

Section 8(d) of the Alaska Statehood Act[91] provided

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[88] 57 Stat. 30, as amended, 48 U.S.C.A. §§ 192-211 (Supp. 1960).

[89] 34 Stat. 478, as amended, 48 U.S.C.A. §§ 230-39, 241-42 (Supp. 1960).

[90] 43 Stat. 464, as amended 48 U.S.C.A. §§ 221-28 (1952).

[91] "(d) Upon admission of the State of Alaska into the Union as herein provided, all of the Territory laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified as changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act." 72 Stat. 344-45 (1958).

that upon admission all territorial laws then in force should remain in force except as modified by the act or the state constitution or legislature; all laws of the United States were to have the same force and effect within the state as elsewhere within the United States. The term "Territorial laws" was defined to include acts of Congress, the validity of which depended solely upon the authority of Congress to provide for the government of Alaska, prior to its admission into the Union. The Alaska game laws and the White Act regulating commercial fisheries in Alaska are considered to be "Territorial laws" as defined in the act. Their validity was based on the power of Congress to govern the Territory of Alaska. Upon the admission of Alaska into the Union, these laws were to continue in full force and effect, except as modified by the Alaska Statehood Act, the Constitution of Alaska or thereafter by its legislature. The Alaska game laws and commercial fisheries acts were enacted by Congress for the broad purpose of conserving the fish and wildlife resources of the territory. The intent of sections 6(e) and 8(d) is that as soon as the state legislature had enacted adequate laws for accomplishing that same purpose, the Secretary would no longer administer the fish and game laws and any acts of Congress not already superceded, would be replaced by state law. It is our belief that upon Alaska's admission on January 3, 1959, the Alaska game laws and acts regulating commercial fisheries, as "Territorial laws", continued in force, but were modified by Ordinance No. 3 of the Alaska constitution, prohibiting the use of fish traps for the taking of salmon for commercial purposes and by Article VIII, section 15, providing that "no exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State". They were further modified by the enactment by the first state legislature of a law making it

unlawful to erect, moor or maintain fish traps[92] and by a later enactment making it unlawful to operate fish traps and prescribing penalties therefor.[93] When the various

[92] SLA 1959, ch. 17 (February 25, 1959) states:

"Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile driven or hand driven fish traps, on or over any lands or tidelands owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska.

"Sec. 2. The lease or sale of any such State lands or tidelands shall contain a restrictive covenant in keeping with the intent of this Act.

"Sec. 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed six months or by fine not to exceed $1,000.00 or by both such fine and imprisonment.

"Sec. 4. Ch. 154, SLA 1955 is hereby repealed.

"Sec. 5. This Act shall take effect immediately upon its passage and approval or upon its becoming law without such approval."

[93] SLA 1959, ch. 95 (April 17, 1959) provides:

"Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; provided nothing in this section shall prevent the operation of small hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally operated in or above the mouth of any stream or river in Alaska; nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos,

articles of the state law providing for the administration, management and conservation of fish and wildlife became effective,[94] acts of Congress on the same subject were no longer of any force. During the period between the date of admission and the date of assumption of full control of management by Alaska the Secretary of the Interior acted as a trustee-administrator. While acting in this capacity he only partially enforced the prohibition contained in Ordinance No. 3 when he ordered the closure of all fish traps except those of appellants.[95] He disregarded the

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or Aleuts (hereinafter called Natives) or is held by the United States in trust of said Natives.

"Sec. 2. Section 1 of Chapter 17, SLA 1959, is hereby amended to read as follows:

"Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or waters owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska.

"Sec. 3. Sec. 2 of Chapter 17, SLA 1959, is hereby repealed.

"Sec. 4. Sec. 3 of Chapter 17, SLA 1959, is hereby amended to read as follows:

"Sec. 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed $5,000 or by both such imprisonment and fine.

"Sec. 5. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year or by a fine not to exceed $5,000.00, or by both such imprisonment and fine."

[94] SLA 1959, ch. 94, art. IV, §§ 1, 3.

[95] See Ketchikan Packing Co. v. Seaton, 267 F.2d 660 (D.C. Cir. 1959), which discusses the Secretary's interim authority.

express provisions of article VIII, section 15 of the Alaska constitution by attempting to authorize a special privilege of fishery in appellants. The before mentioned constitutional provisions were basic state policy and had already been approved by Congress. They and the laws implementing them were not dependent upon the certification of the Secretary under section 6(e) before becoming effective.

Appellants argue that the intent of the Alaska legislature expressed in Session Laws of Alaska, 1959, chapter 95, section 1, was that its acts prohibiting fish traps not be construed so as to violate the provisions of section 4 of the Alaska Statehood Act. From this premise appellants seem to conclude that the legislature enacted chapter 95, solely for the purpose of excepting appellants' traps from the general prohibitions. With this conclusion we disagree. Chapter 95 was enacted for a number of obvious reasons. Chapter 17, enacted earlier in the session, had failed to prohibit the operation of fish traps, and applied only to traps "on or over any lands or tidelands". Chapter 95 made it unlawful to *operate* a fish trap, included traps "on or over any lands, tidelands, submerged lands or waters", and increased the penalties to those provided for in section 12, article III of concurrently enacted chapter 94.

The Secretary's order of March 7, 1959 abolishing all fish traps except those of appellants was in conflict with the provisions of chapter 17 enacted February 25, 1959. Prior to and during these times the Alaska legislature was working on chapter 94, providing for management of fish and game by the state. In order to enact legislation satisfactory to the Secretary and obtain his certification in sufficient time to permit the state to assume management of its fish and game on January 1, 1960, time was of the essence. As section 6(e) read at that time, ninety (90) legislative days had to elapse after the certification and during the same calandar year before the section could become effective on the first day of the succeeding calendar

year.[96] After March 7th the state and the Secretary were in inconsistent written positions as to whether some fish traps were to be permitted or whether all were to be abolished. On the other hand, the Secretary's certification had to be obtained on or about May 1, 1959 in order that ninety (90) Congressional legislative days could elapse during calendar 1959. The Secretary's certification was obtained on April 27, 1959, ten days after chapters 94 and 95 were approved. Whether section 1 of chapter 95 was worded as it was in order to satisfy the Secretary is not apparent from the legislative history of the bill. It is a matter of record, however, that a representative of the Secretary was present in Juneau after March 13, 1959 for the specific purpose of assisting in drafting suitable fisheries legislation. There is nothing in the legislative history of chapter 95 to substantiate a conclusion that the state intended to recognize appellant's claimed right to operate fish traps. The entire background of the issue is contrary to such a construction. A logical explanation of the wording is that it was inserted to preserve or restore administrative harmony at a critical period with the knowledge that the issue would soon be before the courts for decision. In any event, Ordinance No. 3 of the Alaska constitution prohibited the use of all fish traps for commercial purposes in all coastal waters of the state. Appellants' traps were located in coastal waters and were commercial enterprises. These traps could not constitutionally have been excepted from the provisions of Ordinance No. 3 and there is no basis for assuming that the legislature had such an intent.

The decision of the court below dismissing all of appellants' complaints was based in part on the theory that appellants' traps were moored on tidelands or lands under-

[96] Section 6(e) was not amended to substitute "calendar" for "legislative" days until June 25, 1959, see Alaska Omnibus Act, § 2(b), 73 Stat. 141 (1959).

lying inland waters, the sovereignty over which passed to the State of Alaska upon its admission, and that the state's right of sovereignty was paramount to any right theretofore created by Congress for Indians.

Since *Martin* v. *Waddell*[97] was decided in 1842 it has been recognized that the state, as the sovereign representative of its people, owns the right of fishery in the lands within its boundaries lying beneath navigable waters. Later the right of Massachusetts to regulate fishing in the inland waters of Buzzards Bay, an inlet of the Atlantic Ocean about thirty miles long and five to ten miles in width, was recognized by the Supreme Court in 1890.[98] *Shively* v. *Bowlby*[99] gave concise recognition to the doctrine that upon the acquisition of a territory by the United States the title and dominion in tidelands were held by it in trust for states to be ultimately created out of the territory and that new states admitted to the Union have the same rights as the original states in the tide waters and in the lands under them. The policy of the United States has been not to dispose of lands thus held in trust for new states except in unusual circumstances brought on by some international duty or public exigency. Such disposals are not lightly to be inferred, and should not be regarded as intended, unless the intention was definitely declared, or otherwise made very plain. In announcing the above doctrine the Supreme Court of the United States held that a swampy but navigable lake, completely surrounded by a reservation established by treaty for the Chippewa Indians, was not granted to the Indians by the treaty, but held in trust for and later granted to the State of Minnesota on its admission.[100]

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[97] 41 U.S. (16 Pet.) 367, 10 L. ed. 997 (1842).

[98] Manchester v. Commonwealth, 139 U.S. 240, 35 L. ed. 159 (1891).

[99] 152 U.S. 1, 30, 38 L. ed. 331, 342 (1894).

[100] United States v. Holt State Bank, 270 U.S. 49, 55, 70 L. ed. 465, 468-69 (1926).

The Supreme Court of the United States has consistently held that to deny to new states admitted to the Union ownership of the shores of and the soil beneath navigable waters is a denial of admission on an equal footing.[101] The appellee argues that since all of appellants' traps are located within the inland waters of Alaska and not upon lands or waters that came to Alaska by reason of the Submerged Lands Act,[102] as made applicable to Alaska by section 6(m) of the Alaska Statehood Act,[103] the provision of the Sub-

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[101] Pollard v. Hagan, 44 U.S. (3 How.) 212, 228-29, 11 L. ed. 565, 573 (1845); Shively v. Bowlby, 152 U.S. 1, 26, 38 L. ed. 331, 341 (1894); United States v. Texas, 339 U.S. 707, 716, 94 L. ed. 1221, 1226 (1950).

[102] 67 Stat. 29 (1953), 43 U.S.C.A. §§ 1301-43 (Supp. 1960). Sections 1311(a) and 1313(b) provide:

> "§ 1311. Rights of the States—Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development and use
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> (a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof. . . .
>
> "§ 1313. Exceptions from confirmation and establishment of States' title, power and rights
>
> "There is excepted from the operation or section 1311 of this title—
>
> "(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians. . . ."

[103] "(m) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder." 72 Stat. 343 (1958).

merged Lands Act are not applicable to this controversy. Appellee's argument appears to be consistent with the authorities and correct. In deciding *United States* v. *California*[104] in 1947 the United States Supreme Court did not disturb the inland waters doctrine just discussed in holding that California did not own the ocean bottom of the marginal sea. Likewise in its decrees in *United States* v. *Louisiana*[105] and *United States* v. *Texas*[106] the United States Supreme Court carefully excluded the inland waters of those states. In *United States* v. *Texas*[107] Justice Douglas again reiterated the doctrine that title to lands underlying inland navigable waters passes to the new state as an incident to the transfer to it of its sovereignty. However, the Submerged Lands Act was passed in 1953 and it cannot be overlooked that section 1311(a) specifically provides that in public interest "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters" is vested in the states.[108] Section 2 of the Alaska Statehood Act provided that the State of Alaska should consist of all the territory, together with the territorial waters appurtenant thereto, then included in the Territory of Alaska.[109] Pursuant to the provisions of sec-

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[104] 332 U.S. 19, 91 L. ed. 1889 (1947).

[105] 340 U.S. 899, 95 L. ed. 651 (1950).

[106] 340 U.S. 900, 95 L. ed. 652 (1950).

[107] 339 U.S. 707, 716, 94 L. ed. 1221, 1226 (1950); see United States v. Louisiana, 363 U.S. 1, 35, 4 L. ed. 2d 1025, 1049 (1960).

[108] Note 102 supra.

[109] "Sec. 2. The State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." 72 Stat. 339 (1958).

tion 1312 of the Submerged Lands Act[110] Alaska extended its seaward boundaries to include the marginal and high seas to the extent permitted and to include submerged lands.[111]

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[110] 67 Stat. 31, 43 U.S.C.A. § 1312 (Supp. 1960) provides:

"The seaward boundary of each original coastal State is approved and confined as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

[111] SLA 1959, ch. 89, §§ 1-2 provide:

"Section 1. The jurisdiction of this State shall extend to and over, and be exercisable with respect to, waters offshore from the coasts of this State as follows:

"(1) The marginal sea to its outermost limits as said limits may from time to time be defined or recognized by the United States of America by international treaty or otherwise.

"(2) The high seas to whatever extent jurisdiction therein may be claimed by the United States of America, or to whatever extent may be recognized by the usages and customs of international law or by any agreement, international or otherwise, to which the United States of America or this State may be party.

"(3) All submerged lands, including the subsurface thereof, lying under said aforementioned waters.

"Sec. 2. The ownership of the waters and submerged lands enumerated or described in Section 1 of this act shall be in this State unless it shall be, with respect to any given parcel or area, in any other person or entity by virtue of a valid and effective instrument of conveyance or by operation of law."

Geographically and geologically the Alexander Archipelago of Southeastern Alaska has been determined to be a part of a long mountain range commencing with the Talkeetna Mountains in Southcentral Alaska, extending southeasterly to include the Wrangell and St. Elias Mountains. A partial inundation of the southeastern portion of the range resulted in the creation of arms of the sea and inland waterways without actually altering the original coastline facing the open sea. The trial court made Finding of Fact No. 1 based on the affidavit and attached exhibits of the Commissioner of Natural Resources of the State of Alaska.[112] This finding establishes to our satis-

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[112] This finding states:

"The waters of the Alexander Archipelago, State of Alaska, which lie to the landward of a line drawn from Cape Spencer lighthouse at the entrance of Cross Sound, and following generally the sinuosities of the coast, that is, the meander line of mean low water, and bridging headlands and bays as the line is drawn in a general southeasterly direction past Cape Bartholomew, Cape Muzon, and eastwast through Cape Chacon and ending at a line drawn from the northermost extremity of Pt. Mansfield, Sitklan Island, 040° true, to where it intersects the mainland, as more particularly described in 33 C.F.R. 82, 275, are all inland waters and historic bodies of water. Because of historic, social, and geographic considerations, of which this court takes judicial notice, and based also on a consideration of the record in this case, I find:

"That geographically and geologically the Alexander Archipelago is part of a long mountain range which extends from the southern tip of the so-called Panhandle of Alaska's general land mass in a northwesterly direction, and includes the St. Elias Mountains, the Wrangell Mountains, and the Talkeetna Mountains in Southcentral Alaska;

"That the main mass of igneous rocks which intruded the older sediments forms the core of this general land mass. The resulting topography, formed by erosion of the complex fault patterns and contacts between different rock types, and a later partial inundation, is a series of long, narrow arms of the sea, which have encroached upon the general land mass

faction that all of appellants' trap sites were located within the coastline and in inland waters of the state.[113]

We conclude that title to the lands underlying the inland navigable waters upon and over which the fish traps assigned to Kake and Angoon are located, passed to the State of Alaska as an incident to the transfer of sovereignty. No unusual circumstance brought on by international duty or public exigency existed upon which it could be inferred that the intent of Congress was otherwise. To withhold sovereignty over its inland waters from the state in the absence of compelling reasons and without definitely describing in the act of admission the extent of the sovereignty intended to be withheld, would be a violation of the equal footing doctrine.[114] No plain definition of any rights intended to be withheld was given in the act of admission. In the only two instances where Congress expressed an intent in the Alaska Statehood Act that sovereignty be withheld from the state, it did so in concise,

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without actually altering its original coastline facing the open sea;

"That the general land mass of the Alexander Archipelago retains its mountain-range character with elevations ranging from 2,000 to 6,000 feet, and that the present arms of the sea were at one time river valleys which have been eroded by glacial action, creating the long, narrow fiords which exist today as inland waterways, the only substantial means of surface transportation throughout the Archipelago.

"That the historical economy of the area involved is primarily oriented to a marine way of life in which the inland waters furnish the primary, and in many areas, the only industry. Said waters are in every respect a necessary and intimate part and parcel of the territory of the State of Alaska."

[113] United States v. Louisiana, 363 U.S. 1, 79, 4 L. ed. 2d 1025, 1073 (1960) (offshore islands held part of Louisiana coastline).

[114] Shively v. Bowlby, p. 57 supra. [p. 48 this appendix]

descriptive terms.[115] Under the broad power claimed to have been reserved to the United States by section 4 of the Alaska Statehood Act, the Secretary of the Interior could at any time remove or restore the state's sovereignty over any of its inland waters or marginal seas, as long as he purported to act in behalf of Indians.

Our conclusion would be no different even though we considered that the state acquired its sovereignty over inland water by reason of the wording of section 1311(a) of the Submerged Lands Act as appellants contend.[116] Apparently this section was framed to combine in statutory form the judicially established inland waters doctrine just discussed with the grant to the states by Congress of lands beneath tidal waters seaward three geographical miles from their coastlines.[117] The sovereignty thus acquired would be subject to any rights then held by or for Indians under section 1313(b).[118] We have already expressed the view that no such rights in fishing rights were held by or for natives and that no rights were defined in the act of admission where an affirmative duty existed to define any intended reservations. Also, it is our belief that the doctrine of *Shively* v. *Bowlby* would be as applicable under the Submerged Lands Act as in the inland waters doctrine and that no such reservation could be inferred.

Although most of the foregoing opinion applies to Metlakatla as well as to Kake and Angoon, certain additional facts require a separate discussion of Metlakatla's claims.

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[115] See § 10, providing for national defense withdrawals and reserving jurisdiction therein to the United States to the extent described and § 11, reserving exclusive jurisdiction to the United States in Mount McKinley National Park to the extent described. 72 Stat. 345-48 (1958).

[116] Note 102 supra.

[117] United States v. Louisiana, 363 U.S. at 18, 4 L. ed. 2d at 1038-39. See particularly the legislative history of the act, id. n. 16.

[118] Note 102 supra.

The Metlakatlans were originally a branch of the Tsimshian Indian tribe of British Columbia. Under the guidance of a missionary and apparently with the encouragement of the United States, some 800 of these Indians emigrated from British Columbia to Annette Island in Southeastern Alaska in 1886 and established the community of Metlakatla.[119] In 1891 Congress enacted legislation which, "until otherwise provided by law", set aside the body of lands known as the Annette Islands as a reservation for the use of Metlakatlans and such other Alaskan natives as might care to join them.[120] Annette Islands was in an area historically occupied by the Tlingit Indians, although it bordered closely on an area historically occupied by Haida Indians.[121]

In February of 1915 the Secretary of the Interior ruled that natives of Metlakatla could erect fish traps on the shores of Annette Island. On April 7, 1916 Alaska Pacific Fisheries, a private corporation, commenced the erection of a fish trap on Annette Island in the immediate area of Metlakatla. The seaward end of this trap was within 3000 feet of the shore at mean low tide. The shoreward

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[119] Alaska Pac. Fisheries v. United States, 4 Alaska Fed. 709, 711, 248 U.S. 78, 86, 63 L. ed. 138, 140 (1918).

[120] "§ 358. Annette Islands reserved for Metlakahtla Indians Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior." 26 Stat. 1101, 48 U.S.C.A. § 358 (1952).

[121] Tlingit & Haida Indians of Alaska v. United States, 177 F. Supp. 452, 455, 469 (Ct. Cl. 1959) (map exhibits depicting Tlingit-Haida territory).

end was 200 feet to the seaward of the line of extreme low tide so that the trap was completely to the seaward of the upland reservation.[122] On April 28, 1916 President Wilson issued a proclamation declaring the waters within 3000 feet of the shore at mean low tide of Annette and adjacent small islands as a reservation for the Metlakatlans and such other Alaska natives as had or might join them, to be used under general fisheries regulations administered by the Secretary of Commerce. The purpose of the proclamation was stated to be that of supplementing efforts of the Secretary of the Interior to assist the Metlakatlans to self support by placing a cannery in operation on Annette Island. The contiguous waters were being reserved to supply fish for the cannery. All unauthorized persons were warned by the proclamation not to fish in the waters.[123]

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[122] Alaska Pac. Fisheries v. United States, 240 Fed. 274, 277 (9th Cir. 1917), aff'd, 4 Alaska Fed. 709, 248 U.S. 78, 63 L. ed. 138 (1918).

[123] Presidential Proclamation No. 1332, 39 Stat. 1777 (1916), provides:

> "WHEREAS the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and
>
> "WHEREAS it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery.
>
> "Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation; also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have

On May 2, 1916 the Assistant United States Attorney for Alaska advised Alaska Pacific Fisheries of the proclamation, but that corporation denied the President's authority to issue it. A suit for injunction was filed and granted by the District Court of Alaska. The Ninth Circuit Court of Appeals sustained the authority of the President on usage and the practical necessities of government. The Corporation was found to have no permit from the War Department to erect an obstruction to navigation and as to the United States who owned the land, it was held to be a mere trespasser.[124] The Supreme Court of the United States affirmed. It noted the temporary nature of the reservation and the importance of the adjacent fishing grounds. It ignored the Presidential proclamation and held that the geographical name "Annette Islands" was intended by Congress to embrace the "intervening and surrounding waters" as well as the upland.[125] An act of Congress in 1934 which granted citizenship to the Metlakatlans, declared that any reservations theretofore made by Congress or by executive order or proclamation for their benefit should continue in full force, but should continue to be subject to modification, alteration, or repeal by Congress or the President. The act also declared that the granting of citizenship was not to affect their individual or collec-

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joined them or may join them in residence on these islands, to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

"Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned."

[124] Alaska Pac. Fisheries v. United States, supra note 122, at 283.

[125] Alaska Pac. Fisheries v. United States, 4 Alaska Fed. 709, 248 U.S. 78, 63 L. ed. 138 (1918).

tive rights to property nor the right of the United States to supervise the affairs of the colony.[126]

The land reservation was a temporary withdrawal which has been described by the United States Supreme Court as "not in the nature of a private grant, but simply a setting apart 'until otherwise provided by law . . .'"[127] The extension of the reservation by Presidential proclamation to include waters within three thousand feet of the shoreline was at least as temporary as the land withdrawal and possibly more so.[128] In granting citizenship to the Metlakatlans in 1934, Congress confirmed the reservations as

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[126] Act of May 7, 1934, ch. 221, §§ 1-2, 48 Stat. 667 (now covered by 8 U.S.C.A. § 1401 [1952]) provided:

> ". . . [T]he Indians of the Tsimshian Tribe, and those people know as Metlakahtlans, who emigrated from Metlakahtla, British Columbia, Canada, to Annette Island, in the Alexander Archipelago in southeastern Alaska in the year 1887, and there established a colony known as Metlakahtla, Alaska, and any and all other British Columbia Indians who joined them there not later than January 1, 1900, and have since resided continuously therein, having been faithful and loyal to the Constitution, laws and the Government of the United States, are hereby declared to be citizens of the United States."
>
> "Sec. 2. The granting of citizenship to the said Indians shall not in any manner affect the rights, individuals or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakahtla Colony. And any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to modification, alternation, or repeal by the Congress or the President, respectively."

[127] Alaska Pac. Fisheries v. United States, 4 Alaska Fed. 709, 712, 248 U.S. 78, 88, 63 L. ed. 138, 140 (1918).

[128] Sioux Tribe v. United States, 316 U.S. 317, 86 L. ed. 1501 (1942).

they then existed, but specifically provided that they should continue to be subject to modification, alteration, or repeal by Congress or the President.[129]

It appears likely that the land reservation was created to reward the initiative of the Metlakatlans and give them some legal rights to be in an area to which they as non-citizens and non-residents had no historical rights. The decision of the Secretary of the Interior in 1915 to establish a cannery on the island to assist the Metlakatlans is in keeping with the original government policy of encouragement. When the supply of fish immediately available to them to supply their cannery appeared to be jeopardized by the act of Alaska Pacific Fisheries, it then appeared necessary to extend the upland reservation to a distance offshore sufficient to prevent any trap fishing other than by Metlakatlans. Alaska Pacific had located its trap so that the shoreward end was still two hundred feet to the seaward of extreme low tide, therefore no trespass on the upland reservation was being committed. On the other hand, the Metlakatlans as a group had not yet been admitted to United States citizenship. Alaska Pacific Fisheries, as a corporation of a state of the United States, no doubt had superior rights in the fisheries of the inland waters.[130] Extension of the boundaries of the reservation, as was done, may well have been the only alternative presented to the government in order to continue and implement its policy of encouragement toward an alien immigrant group. The effect of the extension, whatever reasons may have motivated it, was to create the only exclusive right of fishery ever to exist in Alaskan waters.

The Metlakatlans have prospered, amalgamated easily with the native and white population and are in all re-

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[129] Act of May 7, 1934, ch. 221 §§ 1-2, 48 Stat. 667 (now covered by 8 U.S.C.A. § 1401 [1952]).

[130] Act of June 14, 1906, ch. 3299, § 1, 34 Stat. 263.

spects citizen assets to the United States and the State of Alaska. Annette Island accommodates one of the larger airports of Alaska which serves as the air port of entry to nearby Ketchikan, which is not accessible by highway, for all except amphibious flights. The citizens on Annette Island operate the gasoline concessions and service the large planes of the certificated carriers that regularly stop there. They sell power from a hydro-electric plant, and operate a sawmill, boat-building facilities and mercantile and other business establishments. Many are trained mechanics, electricians, carpenters and shipwrights. They individually own numerous and valuable seine boats, which they use for halibut as well as salmon fishing.[131] Schools were furnished by the Territory of Alaska and are now furnished by the state. The residents pay all forms of taxes just as do other Alaska citizens. Prosecution for the commission of crimes is handled in all respects as though there was no reservation.[132] The State of Alaska appropriated monies for work projects for depressed areas for fiscal 1960-61. Funds were allocated for Metlakatla as well as for other communities temporarily depressed because of poor fishing seasons.

What we have said previously concerning the omission of Congress to define native fishing rights in the Alaska Statehood Act is equally applicable here. The water reservation held by the Metlakatlans was the only fishing privilege held by a native community at the time of enactment of the Alaska Statehood Act. It did not, in our opinion, qualify as a fishing right as that term was used in section 4 of the act, because of its truly temporary nature. If it had been the intent of Congress that the privilege continue after Statehood we believe Congress would have so stated

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[131] See United States v. Booth, 17 Alaska 561, 161 F. Supp. 269 (D. Alaska 1958) transcript of testimony.

[132] United States v. Booth, 17 Alaska 561, 161 F. Supp. 269 (D. Alaska 1958).

because of the affirmative duty imposed by the Alaska constitution to define any such reservations in the act of admission. The issue now is not whether the Metlakatlans have a right of possession to the waters surrounding their upland reservation superior to that of a corporate trespasser, but whether sovereignty over its inland waters has by inference been withheld from a state of the Union. The presumption is that it was not. Such a withholding is not lightly to be inferred.[133] The continued maintenance of such a right is in direct collision with state constitutional provisions prohibiting fish traps and exclusive rights of fishery. Metlakatla's temporary privilege had nowhere near the status of the hunting right of Race Horse[134] which was secured by a treaty.

It is our belief that Metlakatla's exclusive fishing reservation resulted from a combination of unusual circumstances and acts disconnected in time, designed to assist them in the early days of their settlement. The water reservation would doubtless never have been created if it had not appeared necessary to protect their right to fish with traps to supply their cannery, at a time when trap fishing was legal and widely employed. The existence of the exclusive water reservation is now used as a reason to justify the continued use of traps, even though such use is illegal everywhere else in the state. None of the facts which seemed to justify the creation of the exclusive right of fishery are now operative. The Metlakatlans are now citizens of the United States and of the state of Alaska and have the same right to fish anywhere in the inland waters and marginal sea as other United States citizens. They are as prosperous as the average fishing community of Alaska, if not more so. They are no more entitled to or in

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[133] United States v. Holt State Bank, 270 U.S. 49, 55, 70 L. ed. 465, 469 (1926); Shively v. Bowlby, 152 U.S. 1, 38 L. ed. 331 (1894).

[134] P. 35, supra. [p. 30a this appendix]

need of fishing advantages over their fellow citizens than any other fishing community of Alaska and we do not believe that Congress intended that their temporary privilege in the waters surrounding their upland reservation continue after Statehood. Congress has exercised a fostering attitude toward the Metlakatlans far beyond that extended to the natives of Alaska. They were encouraged to immigrate, were given a land reservation, and although they were non-citizens, the Secretary of the Interior gave them permission to fish with traps. The President then gave them an exclusive inland water fishery reservation to supply the cannery subsidized by the government. This concern for their welfare was continued after they had attained United States citizenship and to the present. Whether Congress had the power to so subsidize an alien immigrant group, even though they were Indians, seems doubtful. The power of the President to create an exclusive fishery reservation for such a group seems even more doubtful. However, these are questions that need not be decided by this court at this time. For the reasons already stated we are of the opinion that Metlakatla's water reservation did not survive Statehood.

Appellants have pointed out that sizeable balances remain unpaid on government loans which financed the purchase of traps, canneries, boats and related gear. They also argue that the loss of trap fishing privileges will seriously affect their economy. It appears from the record that there is a sufficient number of independent seine boats in Southeastern Alaska to supply appellants' canneries. If not, the vacuum will undoubtedly be filled within a very short time. We are not convinced that the over-all economy of appellant communities will suffer. On the contrary, there is every reason to believe that the economy of the individual fisherman will be improved. Financial adjustments on loan repayments may be necessary. Adjustment has already taken place in the salmon industry generally. Private enterprise has been required to make radical finan-

cial and physical adjustments patterned as nearly as possible to the state's flexible plan for the conservation and rebuilding of the salmon resource.

In adopting Ordinance No. 3 abolishing fish traps the people of Alaska were not unaware that some economic adjustments would be required. The pros and cons of the issue had been considered for many years. All persons engaged in the salmon industry had notice of the obvious trend. The referendum of 1948, the overwhelming adoption of Ordinance No. 3 in 1956 and passage of the Alaska Statehood Act in 1958 clearly indicated the early arrival of the day when the will of the people could be effected. Temporary inconveniences must be subordinated to a policy dedicated to preventing exploitation to annihilation of one of the greatest natural food resources known to mankind, to equitable regulation of seasonal harvests for the greatest benefit to the greatest number, while conserving and rebuilding for posterity. The judgments below are affirmed.

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Supreme Court, U.S.
FILED
MAY 11 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM [redacted]-1961

No. 382

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE,

Appellant,

v.

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA, AND THE STATE OF ALASKA

Appellees

No. 383

ORGANIZED VILLAGE OF KAKE, ET AL.,

Appellants,

v.

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA,

Appellee

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE STATE OF ALASKA

BRIEF FOR APPELLEE

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OCTOBER TERM 1959

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE STATE OF ALASKA

BRIEF FOR APPELLEE

JURISDICTION

The District Court for the Territory of Alaska ruled that fish traps are an unlawful device in Alaskan waters and that the regulations of the Secretary of the Interior permitting fish traps in 1959 were void.

This was so because the Secretary, while managing the fishery for a transitional period after statehood, was bound by *existing law* not to permit fish traps nor to create any exclusive or several right of fishery. The "existing law" was the so-called White Act (48 U.S.C. 221, *et seq.*) which, pursuant to Section 6(e) of the Statehood Act, 72 Stat. 339 (1958), continued in effect (insofar as it was consistent with the State Constitution) until January 1, 1960.

In the proposed fishing regulations for 1960 (Appendix 3), the Secretary *for the first time* claims Section 4 of the Statehood Act as his authority. Appellants assert that Section 4 provides them with immunity as long as they are engaged in fishing. Thus, the rights of all litigants are, for the first time, made to turn solely upon the construction of Section 4 of the Statehood Act.

When it submitted its Brief in Support of Motion to Affirm or Dismiss (pp. 16-17), Appellee was of the belief that the Secretary of the Interior was claiming only 6(e) as his authority, and that future reliance upon Section 4 "was possible but improbable." At that time, Appellee admitted that if the Secretary claimed Section 4 as his authority [as he has now done in the 1960 proposed regulations (Appendix 3)], then a justiciable issue would be presented to this Court. We have already briefed the "moot issue."

After examining Briefs of Appellants as well as the Briefs of the Solicitor General, we believe the position taken by them, i.e. that the lower court was the highest court of the State, is correct.

STATEMENT OF THE CASE

It is essential in this litigation that the relationship of the Alaskan native to the total Alaskan community be understood. The status of the Alaskan native is a specific fact in this litigation. This is so because this Court must decide whether or not the Federal Government can now extend its arm into Alaska to confer special privileges on certain State citizens against the will of the State. Accompanying this problem is the associated problem of ascertaining the extent of State control over its largest resource, the fisheries.

The State can control its fishery only to the extent that it can control its citizens, both native and white, who fish. For the foregoing reasons, Appellee presents this Statement of the Case although perhaps it is presumptuous in assuming that this Court is not already as familiar with Alaska as it is with other states.

Appellants are three Indian corporations located in southeast Alaska.

> "The mode of life for the southeast Alaskan Indian is much the same as that of the whites. The Indians live either in villages of their own or in the principal towns such as Craig, Juneau, Ketchican, Petersburg, Sitka, and Wrangell . . . The Indian lives in the same type of residence as the white man, wears similar clothes, and eats similar food. He is a citizen and a voter. He works alongside of and in competition with white citizens at the available local vocations. Both Indians and whites take wood for domestic purposes from national forest land (without permit or payment) but otherwise make little use of the forest areas. Fishing for food is done in saltwater, not in the fresh water

streams. Both white men and Indians trap and hunt over the same areas. The Indians adjustment to the white man's way of life is about complete." [1]

Alaska entered the Union on January 3, 1959, with a state constitution which prohibited the use of the commercial fish trap as a means of taking salmon (Ordinance No. 3 of the State Constitution). Salmon are a free-swimming anadromous fish,[2] and the salmon industry is Alaska's largest industry.[3] The total salmon pack has dwindled under federal control and management from a peak of nearly 7,000,000 cases in 1918 to less than 3,000,000 cases in 1953 [4] and finally to the lowest pack in history—under 2,000,000 cases in 1959.[5] The people of Alaska have demonstrated their desire to abolish the fish trap [6] as a means of taking salmon over and over again during the decade and a half preceding statehood.[7]

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[1] REPORT OF SECRETARY OF AGRICULTURE BENSON TO CHAIRMAN, COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, JAN. 11, 1954. See Committee Print No. 12, supplemental reports dated Jan. 11, 1954 on H.R. 1921, 83rd Cong., 2d Sess. 5-6.

[2] *Anthony* v. *Veatch*, 220 P.2d 493 (1950).

[3] See Appendix 2.

[4] GRUENING, STATE OF ALASKA (1954) 210, 405. This book was cited and the author described as "our foremost Alaskan authority" in *Tee-Hit-Ton Indians* v. *U. S.*, 348 U.S. 272, 294.

[5] See Appendix 1: PRELIMINARY REPORT OF THE U. S. DEPARTMENT OF INTERIOR, FISH AND WILDLIFE BUREAU OF COMMERCIAL FISHERIES —ALASKA REGION.

[6] For description of fish traps, see GRUENING, STATE OF ALASKA (1954) 170-171. See also *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87.

[7] Time and again in recent years, the Territorial Legislature has sent memorials to Congress praying for the abolition of fish traps.

As soon as the first state legislature was convened, it passed legislation to implement the constitutional fish trap ban (Chapters 17 and 95, SLA 1959). Traps in Alaska, under state law, were abolished without exception. That traps should have been abolished for all persons without an exception for natives [8] is not unusual in view of the long and unrelenting fight by the Alaskan Native Brotherhood to end fishing by means of traps.[9]

This is the customary method employed by the legislature to request of Congress action on matters over which the Territory had no control, such as the state fishery. For example, see Session Laws of Alaska 1947, 325-326; 1949, 488-489; 1953, 401-402; 1955, 447-448. See also Ordinance No. 3 of State Constitution approved in 1956 and 1959 implementing legislation, i.e., Chapters 17 and 95, SLA 1959. See also GRUENING, STATE OF ALASKA (1954) 397-399.

[8] 4 of the 8 members of the State Board of Fish and Game are natives or are married to natives. See also, THE NATIONAL CONFERENCE AND THE REPORTS OF THE STATE ADVISORY COMMITTEES TO THE U. S. COMMISSION ON CIVIL RIGHTS, 1959 (Govt. Print. Office 1960) 48 *et seq.* The Mayor of Appellant Angoon, Andrew Gamble was a member of the Commission, 48.

[9] It is significant that as recently as November 1959, when only native traps had been fishing, the Alaska Native Brotherhood by resolution reiterated its stand for complete abolition of fish traps. The resolution, front page news all over Alaska, was as follows:

"Convention at Yakutat, November 9-14, 1959.

RESOLUTION No. 64-36, INTRODUCED BY KLAWOCK, CAMP #9

ENTITLED: Abolition of all Fish Traps

Whereas, the native people of Alaska, through their officially recognized organization, have consistently opposed the use of fish traps in Alaskan waters, and

Whereas, their opposition to these fish traps is in no way contrary to the State Constitution of Alaska,

THEREFORE BE IT RESOLVED that this convention of the Alaska Native Brotherhood and the Alaska Native Sisterhood

The members of the three Appellant corporations voted for the abolition of traps (Opinion of District Judge Raymond J. Kelly, R. 59, 60).

Metlakatla has been in the canning business since 1914.[10] Kake and Angoon have used fish traps since 1950 and 1948 respectively (R. 83, 102). All three corporations were put into the fish canning business by the Federal Government and all three are heavily in debt to the United States.[11]

Since 1958, other communities (native and white) have been forced to operate canneries without operating fish traps, and must secure their fish with seine fleets or by purchase from independent seine boats (R. 48, 51, 52, 53).

Following the filing of an information against one native, one white man (a Whiz Fish Company employee from the State of Washington) and the Whiz Fish Company, a corporation installing traps for Appellants and managing one cannery, the three Indian corporations Appellants here sought injunctive relief (R. 5,

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reiterate our stand for complete abolition of traps, and that a copy of this resolution be directed to the Governor of Alaska.

/s/ A. E. WIDMARK,
Grand President, A.N.B.
Attest /s/ C. E. PECK,
Grand Secretary, A.N.B.

The Alaska Native Brotherhood is an organization of stature and is recognized as such. See COHEN, FEDERAL INDIAN LAW (revised by U. S. Department of Interior 1958), page 963.

See also GRUENING, STATE OF ALASKA (1959) pages 397-398.

[10] *Alaska Pacific Fisheries* v. *United States*, 240 F. 274, 278 (9th Cir. 1917).

[11] Affidavit of Haldane (R. 30, 31); affidavit of Albert Thompson (R. 98); affidavit of Samuel Johnson (R. 116).

82 and 102) in the District Court for the District of Alaska, Division No. 1, at Juneau. Following dismissal of the complaints by the District Court, the plaintiffs appealed to the Supreme Court of the United States for injunctive relief pending appeal. Oral argument was heard on July 10, 1959. Under authority of Justice Brennan's injunction, the Appellants operated their traps during the 1959 salmon season.

On April 10, 1960, Governor William A. Egan of Alaska received notice from Secretary of the Interior Fred A. Seaton that again in 1960 fish traps would be sanctioned under proposed Federal regulations.[12] These proposed regulations (Appendix 3) are drastic and far-reaching. Appendix 4 is a map showing the area of southeastern Alaska indicating waters in which Indians can fish under the regulations of the state or those proposed by the Secretary of Interior, *whichever are more liberal.* A cursory examination of the census figures will show that the inability of the state to regulate native fishing will constitute an insuperable obstacle to the ad-

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[12] "Dear Governor Egan:

With this letter we are enclosing a copy of proposed new federal regulations governing commercial fishing by Indians in Alaska, which we are submitting for early publication in the *Federal Register.*

These regulations are being proposed solely for the purpose of protecting fishing rights of the native people which have long been recognized by federal statutes, regulations, and customs, and which were secured to them by Section 4 of the Alaska Statehood Act of July 7, 1958. We shall welcome any comments the State of Alaska has to offer concerning these proposed regulations.

Sincerely yours,

FRED A. SEATON,
Secretary of the Interior".

ministration of a conservation program for migratory fish. 42% of the resident Alaskan fishermen are Indians.[13]

Appellants are 3 of 59 Indian corporations located throughout the State.[14] Approximately *12%* of the citizens of Alaska are indigenous,[15] and *15%* of the first State legislature is composed of natives [16] elected prior to this fishing controversy. The President of the State Senate, Senator Baltz, is an Eskimo. State representative Andrew Hope, an Indian, was elected by the members of Appellant corporation Angoon and others in Election District No. 4. State Senator Frank Peratrovich, an Indian from Klawock,[17] was elected from the *Southeastern District* of Alaska at large by the members of all three of the Appellant corporations and others.[18] *This District* is composed of *78.3% whites* and *21.7% indigenous* persons. (Appendix 5)

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[13] The 1950 census indicates that of a total of 3,121 Alaskans employed in the fishing industry in all of Alaska, 1,804 are white, and 1,317 are non-whites. U. S. Bureau of the Census. U. S. Census of population: 1950, Vol. II, characteristics of the population, Part 51, Alaska. U. S. Government Printing Office, Washington, D. C. 1952—Table 20, 51-24. See also Appendix 5.

[14] COHEN, FEDERAL INDIAN LAW (revised by the Department of Interior, 1958) 962, at note 14).

[15] THE NATIONAL CONFERENCE AND THE REPORTS OF THE STATE ADVISORY COMMITTEES TO THE U. S. COMMISSION ON CIVIL RIGHTS, 1959 (Govt. Printing Office, 1960) at page 48, *et seq.* contains a report on Alaska. According to this Report, there are 300,000 whites, 37,000 natives and 8,000 Negroes in Alaska. Therefore, 12% of the population is indigenous. According to Appendix 5, 19% of the population in 1956 were natives.

[16] The State legislature is composed of 60 members of which 9 are natives. Many more are married to natives.

[17] According to COHEN, *op. cit., supra*, note 15 at 962, an Indian corporation organized under the same law as these Appellants was chartered in Klawock in 1939.

[18] These facts are of course common knowledge in Alaska.

Appellant Metlakatla alleged in paragraph 15 of its Complaint

> "That in recent weeks public interest in the controversy has mounted. Isolated outbreaks of violence have already taken place and it is feared that if the situation is allowed to continue without a determination of the rights of the parties immediately that violence will increase." (R. 15)[19]

In Southeast Alaska prior to statehood 113 to 262 fish traps were operated (R. 41), the abolition of which caused financial hardship. (R. 49, 61)

SUMMARY OF ARGUMENT

In the Statehood compact, Congress and the State intended to preserve the status quo of certain Indian fishing rights. These Appellants cannot show:

(a) That there ever was an Indian fishing right to a particular fish trap site in the commercial fishery;

(b) That this right existed prior to Statehood and therefore is the status quo that Congress preserved;

(c) That the racial equality in the use of the commercial fishery which existed prior to Statehood was destroyed even though Congress intended to preserve the status quo;

(d) That these Appellants hold tribal Indian rights and are entitled to claim a special privilege (if any is found to exist).

Even if Appellants were to prevail on the foregoing points, the "equal-footing doctrine" prohibits dis-

[19] Justice Brennan inadvertently attributed this allegation to the State Attorney General. This issue was raised by Appellant Matlakatla (R. 15). No similar allegation has been made by the State.

crimination against the State of Alaska in the control of its fish and game as well as its inland waters.

In the organization of our Brief, the general law is stated and then applied to the special circumstances of each Appellant.

I

To determine the status quo preserved, it is necessary to ascertain the rights held by the Appellants prior to Statehood. The courts have unanimously held that although a *fish trap* and a fishing boat are property, no one can own a *fishing site* for traps nor a fishing area for boats. A *fishing site* cannot be acquired by prescriptive use or by purchase, and prior to Statehood such a site could not be given to Alaskan natives by the Secretary of Interior. Both natives and whites had an equal opportunity to use the *fishing sites* claimed by Kake and Angoon. The rule has always been that the first in time to occupy a site for a fishing season was first in right to the continued occupancy for that *single season.* No right carried over from year to year.

Kake and Angoon corporations purchased fish traps less than 13 years ago from white vendors—a *fishing site* was not susceptible to ownership.

Members of Appellant corporation (Metlakatla) may have an exclusive right to fish a given area but they have always been bound by the general fishery regulations and conservation laws when the United States exercised the municipal jurisdiction which is now exercised by the State. Metlakatla possibly still retains the *exclusive use* of an area. We contest its right to the *unregulated use* of a migratory resource when that resource passes through the Metlakatlan area. Under the status quo which was preserved, Metlakatla

never had an *unregulated use* and was never excepted from the general conservation laws.

II

Section 4 of the Statehood Act preserved the status quo. Congress was not certain whether Indian fishing rights did exist and therefore intended to preserve such rights, if any, by leaving the matter to future legislative or judicial determination. This was not a grant by Congress. Similarly, there was not a grant by the State for the State could not disclaim a right which had never existed.

In construing the bilateral statehood compact, the intent of both parties must be considered. The State Constitution and the state laws as determined by the State Court contemplated racial equality (status quo) in the common commercial fishery. Similarly, the organic and state law contemplated the abolition of the use of traps, without exception, pursuant to a State constitutional ordinance which was voted upon and approved by the members of Appellant corporations. Can it be said that the members of Appellant corporations voted overwhelmingly to pass a constitutional ordinance which would apply to whites—because the State would have no jurisdiction over its citizens of Indian blood? We think not. Everyone who participates in the law making process is bound by the law which is established despite race, and this is true even though it is financially unpleasant. The native fishermen of Alaska (who constitute 42% of the Alaskans in the fishing industry) led the long over-due reform movement for the abolition of fish traps. They are bound by the result.

The Omnibus Act was a unilateral amendment to the Statehood compact. It was not intended by Congress to operate to the detriment of the State nor could it so operate. It has no bearing on this litigation.

III

The reservation of exclusive Federal "jurisdiction and control" within an area of inland waters held in trust for the State must be geographically ascertainable. The demarcation line of State-Federal criminal and civil jurisdiction must be more certain than that existing in the reservation for Metlakatla of "surrounding waters." The question is: how much surrounding water? The Presidential Proclamation providing for a 3000 foot exclusive fishing area has not been accepted by this Court. The term "surrounding waters" was sufficient when the United States held both municipal and Federal jurisdiction, but now, for a line of demarcation, only the language of the Statute defining the Metlakatla reservation as a "body of lands" can be used. The reservation of waters is vague and indefinite and has fallen. "The reservation was not in the nature of a grant but simply a setting apart until otherwise provided by law." The contingency anticipated by this Court occurred when municipal jurisdiction devolved upon the State.

IV

Native blood (racial origin), alone, is not recognized as a basis for a dual set of laws and the exemption of citizens of native blood from a State law and Constitution which they helped to write. The federal power is based on the Commerce Clause and applies only when persons of Indian blood are *tribal*. Appellant Met-

lakatla has pleaded no tribal organization, has for many years exercised full political rights, has lived under and in accordance with Territorial and State law, and has participated fully in the life and economy of the greater Alaskan community. The grade and high schools of all three communities are State operated.

Members of the Kake and Angoon corporations exercise full political rights, and neither they nor the fish traps sites they claim are on an Indian reservation. Angoon was incorporated many years ago as a State (then Territorial) municipal corporation. The community of Kake was incorporated in 1952 and now exists under State law as a first class city. If tribal government or organization ever existed, it has been relinquished in favor of the State law of municipal corporations. The fact that Appellants are 3 of the 59 Federal Indian corporations organized in Alaska for commercial purposes is not sufficient to exempt them from State law governing the commercial fishery of Alaska. An arm of the Federal Government may properly assist needy Indians or Indian corporations by loan programs and otherwise. However, it cannot reconstitute them as "Indian tribes" in order to make a welfare program out of Alaska's fishery. This has been previously attempted and this Court held at that time that the common fishery of Alaska could not be so used. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86.

V

The equal-footing doctrine contemplates a Union of equal states. If there has been discrimination against the State of Alaska by withholding control of fish and game, and control of inland waters and jurisdiction over its citizens purely on the basis of racial origin, then such discrimination is unconstitutional.

ARGUMENT

I

THE STATEHOOD ACT PRESERVED A STATUS QUO UNDER WHICH NO INDIVIDUAL OR GROUP, NATIVE OR WHITE, EVER HAD A "FISHING RIGHT" TO OPERATE A FISH TRAP AT A PARTICULAR SITE. ALL FISHED AS EQUALS.

A. Statement of the General Law

It is impossible by a disclaimer to create a right which never existed.

Two principles are firmly established in the Alaska fishery law: (1) there is no exclusive right or privilege to the common fishery, and (2) first in time is first in right to fish a particular site. Traditionally, it has been household law in Alaska known to everyone that no one had a right to a fish trap [1]—conversely, everyone had a right to every fish trap site. This was understood by the people of Alaska as being the fundamental rule of their largest industry, and this rule has been judicially stated in the courts time and time again.

In 1916 in the case of *Columbia Salmon Co.* v. *Berg*, 5 Alaska 538 (D. C. Alaska, 3d Div., 1916), the court observed that a fish trap is destroyed if left in position during the winter months,[2] leaving no continuing right from year to year, and held that:

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[1] For descriptions of fish traps see *P. E. Harris & Co.* v. *Mullaney*, 12 Alaska 476, 479-80, 87 F. Supp. 248, 249 (1949); *Columbia Salmon Co.* v. *Berg*, 5 Alaska 538, 544 (D.C. Alaska, 3d Div., 1916); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87; GRUENING, STATE OF ALASKA 170, 171 (1954).

[2] See also *Thlinket Packing Co.* v. *Harris & Co.*, 5 Alaska 471, 500 (D.C. Alaska, 1st Div., 1916).

"Regardless then of the former ownership or claim of ownership to this fish trap site, the defendant seems to have been *first in point of time in entering upon and taking physical possession* of this fish trap site, and was exercising such diligence in the erection and construction of the same as entitled him to be undisturbed therein, . . ."[3] (Emphasis added)

Twenty years of prior usage of a particular site gave no right which carried over from year to year,[4] because no right could be acquired prior to the specified opening day and hour of the season.[5]

The principle of first in time is first in right does not yield even in the face of substantial monitary loss. In *General Fish Company* v. *Markley,* 13 Alaska 700, 105 F. Supp. 968 (D.C. Alaska, 3d Div., 1952), the court held that even though $20,000 was paid for a trap site in 1946, the purchaser could not protect himself from one who first took possession of the site for the 1952 fishing season. A *fish trap site* cannot be purchased. A *fish trap* can be purchased.

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[3]The possession of a War Department permit gives no right other than to obstruct navigation. *Thlinket Packing Co.* v. *Harris & Co., supra* note 2; *Alitak Packing Co.* v. *Alaska Packers' Assn.,* 6 Alaska 277 (D.C. Alaska, 3d Div., 1920); *General Fish Co.* v. *Markley,* 13 Alaska 700, 105 F. Supp. 968 (D.C. Alaska, 3d Div., 1952).

[4]*Fisher* v. *Everett,* 11 Alaska 1, 66 F. Supp. 540, 542 (D.C. Alaska, 3d Div., 1945). This case reviews the complete line of authority establishing the doctrine that first in time is first in right, 66 F. Supp. at 550.

[5]*Canoe Pass Packing Co.* v. *United States,* 270 Fed. 533, 5 Alaska Fed. 25 (9th Cir. 1921).

The absence of a right in *General Fish* is strikingly similar to the absence of a right in Angoon and Kake, who likewise claim to have purchased fish trap sites in 1948 and 1950 respectively (R. 83, 102-3) from non-Indian vendors.

It is truly a race. In *Snug Harbor Packing Co.* v. *Miller,* 15 Alaska 111, 123 F. Supp. 150 (D.C. Alaska, 3d Div., 1954), the court held that a trap won the right to fish because its apron was raised and it therefore started fishing before the defendants could get the motor on their skiff started.

Not only could fish trap sites not be acquired by the Indian corporations by purchase, but the right to an exclusive fishery could not be given to Alaskan Indians by the Secretary of the Interior according to *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86.

The statutory basis for this decision was the White Act of 1924[6] which granted to the Secretary of Commerce (now Interior) the power to regulate the fisheries of Alaska. The Act contains the following language:

> "Provided, that every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies, and that *no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right* to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior." 48 U.S.C. § 222 (Emphasis added.)[7]

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[6] 44 Stat. 752, 48 U.S.C. § 221 *et seq.*

[7] During the hearings on the White Act, Alaska's delegate to Congress submitted a resume of the fishery laws of the World

Pursuant to the statutory mandate the trap sites fished by Appellants in 1959 and claimed by them can be found listed among those permitted generally in the area involved in 1958 under regulations by the Secretary. Sites were not designated as belonging to a particular person,[8] group or Indian village. (R. 101, 115) The regulations merely stated that a trap or traps would be permitted in a certain area.[9] Frequently, only one trap could be operated at each of said points because of the further regulations that traps had to be not less than a mile or a mile and a half apart.

Many arguments can be made as to whether the Alaska constitutional ban against fish traps is a conservation measure. Ordinance No. 3 of the State Constitution which bans fish traps recites among other things that the abolition of fish traps is to

> "... conserve the rapidly dwindling supply of salmon in Alaska ...."

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and of the States of the Union in support of the virtually universal principle that the public right in the common fishery cannot be granted away. *House Committee Hearings of 1924*, Vol. 346, 123-136.

[8] The Attorney General of the United States has said:

> ". . . The limiting of the number of trap sites and of the amount of fish that may be taken by means of traps are ordinary conservation measures and within the authority conferred by the statute. On the other hand, it does not appear that any provision of the statute can reasonably be construed as authorizing the allocation of trap sites to particular individuals." 40 Ops. Att'y Gen. 175, Attorney General Francis Biddle, April 8, 1952.

[9] Appendix 6 traces the federal regulations back to 1945 and shows how until 1958 trap sites and trap fishing areas were permitted by general regulations and not identified by ownership or race.

B. The Members of the Metlakatla Corporation (Most of Whom Are Not Alaskan Aboriginals but All of Whom Are Citizens of the State) May Have the Right to Fish an Area Exclusively Yet They Have Always Been Bound by the General Fishery Regulations and Conservation Laws When the United States Exercised the Municipal Jurisdiction Which Is Now Exercised by the State.

Appellant Metlakatla has never had an unregulated right to fish and is bound by the general fisheries laws even though it may have a right pursuant to a statutory reservation and a Presidential Proclamation to exclusively fish a particular area.

The Metlakatla Indians emigrated from Canada to the Annette Islands in 1887. Their complaint makes no claim to aboriginal rights[1] which were disclaimed as a condition of entry into the United States. *U.S.* v. *Booth,* 17 Alaska 561, 161 F. Supp. 269 (1958). Congress created a reservation for them. 26 Stat. 1095, Section 15 (1891). In 1916 President Wilson by proclamation apparently extended their reservation from merely the "body of lands known as Annette Islands" to include 3,000 feet of the surrounding waters.[2]

This proclamation provided that the waters were to be used by them under the *general fisheries laws and regulations.* As we have shown, no particular fishing

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[1] As a matter of fact, the Court of Claims in *Tlingit and Haida Indians of Alaska* v. *United States,* 177 F. Supp. 452, 468 (1959), has determined that aboriginals of Southeastern Alaska, the Tlingits and the Haidas, are entitled to compensation for 86,740 acres consisting of the Annette Island reservation. In other words, the United States is now in the process of compensating Alaska aboriginals for what it took from them and gave to the Metlakatlans.

[2] Proclamation No. 1332, April 28, 1916, 39 Stat. 1777.

sites could be assigned to individuals under the White Act.[3] The fisheries of the Territory were governed by a single Act, a single set of regulations (so far as is important here) and the only legitimate interest the Secretary could have had under the general fisheries law was conservation. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 122. The rules of conservation and methods of taking fish, the opening and closing of seasons, and all other aspects of commercial fishing regulations were general. Any regulatory conservation scheme governing migratory game must have general application or fail. We have the factual situation of *Missouri* v. *Holland*, 252 U.S. 416, with the Metlakatla reservation being Missouri.

When President Wilson extended the reservation into the surrounding waters, the proclamation reflected his appreciation of this principle. The meaning, therefore, of the proclamation is that the Metlakatlans shall fish within the framework of the general scheme of fisheries laws of the United States and be bound by the unpleasant duty of sharing the burden of conservation whether it be by abstention for certain periods, limitations on gear, or otherwise. It is for this reason that historically the Secretary of Interior's regulations did not segregate the Metlakatlans or their reservation from the general conservation scheme for migratory salmon contemplated by the White Act.[4]

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[3] 44 Stat. 752, 48 U.S.C. § 221 *et seq.*

[4] Appendix 6 gives citations to fishing regulations of the Department of Interior from 1945 to date showing how the traps of Metlakatla were merely several among many permitted in the Clarence Strait District until the 1959 regulations which caused this litigation. Appendix 7 shows which trap sites were actually fished since 1945.

Appellant Metlakatla at most has an easement or profit à prendre and can in no event have any greater right than the Seneca Indians as recognized by this Court in *Kennedy* v. *Becker,* 241 U.S. 556, where it was held that the ownership of an easement or a profit à prendre to fish a particular area did not deprive the state of its police powers to regulate the taking of fish and game. In *Dow* v. *Ickes,* 123 F. 2d 909, 914 (D.C. Cir. 1941), *cert. denied* 315 U.S. 807, *rehearing denied* 315 U.S. 830, the court said:

> ". . . taking of herring could be permitted, of salmon prohibited. Use of seines and boats with nets could be allowed, that of dynamite and traps prohibited. . . ."

The import of the holding is that the type of gear, the location of gear, and all aspects of the methods and means of taking fish in Alaska waters were within the discretion of the Secretary and could be altered from year to year as he determined for purposes of conservation.

A resource, which by its nature must be vigorously conserved or destroyed, cannot be subjected to dual regulations. The inevitable result is destruction. Commenting on the fisheries of Alaska, the Court in the *Dow* case, *supra* at 914-15, said that the White Act

> ". . . comprehends all commercial fishing in Alaskan waters, not merely fishing for salmon by trap. *They relate to a broad, inclusive and co-ordinated scheme. Effective control in particular respects amounts to nothing towards achieving conservation unless the scheme as a whole works to that end."* (Emphasis added)

Arguments have been made that a dead fish is a dead fish whether it is caught by nets, lines, or traps.

The mayor of Metlakatla has conceded:

> ". . . that the purpose in seeking ban on the use of fish traps in Alaska was to conserve the runs of salmon." (R. 37)

But the mayor says further,

> ". . . that the use and operation of the four fish traps of the community will but in a very minor manner, if any, affect the conservation of salmon in Alaska waters."

We agree with the mayor of Metlakatla that the ban on fish traps is a conservation measure. We cannot agree with the argument that although all other fish traps in Alaska should be banned for conservation purposes, those of Metlakatla should not. The objection to fish traps in Alaska is their excessive efficiency.[5] "Excessive efficiency" was the same objection recognized by the court in describing purse seines in *Corsa* v. *Tawes,* 149 F. Supp. 771, 773 (1957), *affirmed on appeal,* 355 U.S. 37.

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[5] This was vividly described in 1924 by Alaska's delegate to Congress Sutherland as follows:

> ". . . when the fish are congregated in one body moving toward the parent stream if by accident they come in contact with a trap lead and the lead fish enters the trap it is more than probable that the entire supply of that stream to the last fish is taken, and therefore a great many of the smaller streams in Alaska are barren of fish, and any number of men in Alaska will tell you by the method of the trap the entire supply is exterminated." *Congressional Record—House,* April 9, 1924, at 5966.

Appellant Metlakatla claims an exclusive fishing area extending 3,000 feet seaward from the shoreline of the Annette reservation pursuant to Presidential Proclamation which provided that these waters were

> "... to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce."[6]

The sense of this Proclamation was that Metlakatla should not be excepted from the operation of the general fisheries laws which were administered by the United States in its capacity to exercise municipal jurisdiction in a territory. Metlakatla may have a fishing reserve —exclusive perhaps, unrestricted or divided, no.[7] This jurisdiction has devolved upon the State of Alaska.

This Court in *Alaska Pacific Fisheries, supra,* stated, as to the Metlakatla reservation, that not only the uplands but also the adjacent waters and submerged lands

> "... were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority.

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[6] We assume for the purposes of this argument that the Presidential Proclamation (Proclamation No. 1332, April 28, 1916, 39 Stat. 1777) is valid. As will be shown in Argument III, *infra*, the Presidential Proclamation was not dignified by this Court in *Alaska Pacific Fisheries* v. *U. S.*, 248 U.S. 78 when *that issue* was raised.

[7] By restricted, we mean released from the general state conservation laws which apply to migratory fish before they go into reservation waters, and after they come out. By divided, we mean a division of authority.

(cases cited) The reservation was not in the nature of a private grant, but simply a setting apart, 'until otherwise provided by law,' . . ." (case cited).

Thus, the United States held at that time the municipal powers to regulate fisheries, tidelands, and inland waters which are now within the jurisdiction of the State of Alaska.[8]

Under the Westland Proviso in Section 6(e) of the Statehood Act, 72 Stat. 339 (1958), the general control of Alaska fisheries has passed to the new state.[9]

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[8] The exercise of municipal powers by the United States has been repeatedly observed by the Ninth Circuit Court of Appeals, *Alaska Pacific Fisheries* v. *United States*, 240 Fed. 274 (9th Cir. 1917). In discussing the Metlakatla waters the Court stated:

"The jurisdiction exercised by the Commonwealth of Massachusetts over the waters of Buzzard's Bay is the jurisdiction which the United States has over the waters of Alaska; and . . . the appellants have acquired no rights, vested or otherwise, to construct or maintain a fish trap within the waters reserved by the President's Proclamation . . ." 240 Fed. at 285.

[9] We have submitted the foregoing argument at this stage in our Brief because we think it constitutes the most limited ground upon which this Court may honor the Alaska State Constitution and its prohibition against fish traps.

C. The Kake and Angoon Corporations (the Members of Which Are Alaskan Aboriginals, Are Ordinary State Citizens and Are Not Located on an Indian Reservation) Purchased Fish Traps (Not Fishing Sites) Less than 13 Years Ago and Operated the Devices Under Fisheries Laws Which Gave Every Citizen the Same Right to Fish a Particular Site Each Year.

Kake and Angoon have never had any special privilege or right based on race.

Although Appellants Kake and Angoon have pleaded no Indian reservation, no aboriginal rights, and no long-standing custom and usage, the briefs of Appellants indicate reliance on these points. In *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 285, this Court held *that as of 1955* no aboriginal property rights had been recognized by Congress and said:

> "We have carefully examined these statutes [1] and the pertinent history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken." (footnote added) 348 U.S. at 278.[2]

Because the fishery of Alaska has been open to all citizens alike with no special privilege for Indians, the Indians lost the exclusive right of a fishery which was exclusively theirs before the coming of the white man.

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[1] Act of May 17, 1884, 23 Stat. 24; Act of June 6, 1900, 31 Stat. 321.

[2] See also *United States* v. *10,950 Acres of Land in Juneau,* 11 Alaska 518, 75 F. Supp. 841 (D.C. Alaska, 3d Div., 1948).

As was observed in *Tlingit and Haida Indians of Alaska* v. *United States,* 177 F. Supp. 452 (Ct. Cl. 1959), in 1885 a report concerning the Indians of Alaska was made and the court observed:

> "... The Report did not recommend that preserving to the Indians of areas traditionally used for hunting, fishing, and gathering it being assumed that these areas would be opened for white settlement and exploitation. ..."

As a result, the court found:

> "... The most valuable asset *lost* to these Indians was their fishing rights in the areas they once used and occupied to the exclusion of all others ..." (Emphasis added) 177 F. Supp. at 468.

It is just as impossible to return to the Indians the fishery of Alaska as it is impossible to return to them the State of Kansas, although both were once exclusively theirs. Recognition of this is found in the jurisdictional act giving rise to the *Tlingit and Haida* case, *supra,* where monetary compensation is recognized as the only avenue by which justice can be done.[3]

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[3] The United States Court of Claims has ruled that aboriginals may receive compensation for their lost rights pursuant to a jurisdictional act of June 19, 1935, 49 Stat. 388. *Tlingit and Haida Indians of Alaska* v. *United States,* 177 F. Supp. 452 (Ct. Cl., 1959). The claim of the Indians involves practically the whole of southeastern Alaska. It includes the uplands adjacent to the fish traps under consideration, because these are a part of the Tongass National Forest. (R. 83, 103) As previously noted, it also includes the Metlakatla reservation. The claim of the Indians is that the Metlakatla reservation and the Tongass National Forest have been taken from them by the United States and that they are entitled to compensation for the same.

As we have shown earlier, the rights to fish a particular fish trap site did not carry over from year to year. It was a perennial race, if anyone wanted to attempt to acquire a site which had previously been fished by another. In 1958, the last fishing season prior to statehood, every citizen of the United States had an equal right to the fish trap sites claimed by Kake and Angoon provided he wished to incur the tremendous expenditure of constructing and placing the traps and running the risk that if he were not first in time, he would not be first in right.[4] When Alaska was admitted into the Union on January 3, 1959, the Appellants Kake and Angoon had absolutely no right to the traps they fished in 1958, because until they took possession of the sites for purposes of fishing in the spring of 1959, they did not have a possessory right which a court could recognize. The Secretary of the Interior by regulations in 1959 *after statehood* attempted for the first time to give to Kake and Angoon the right to place a fish trap regardless of whether they took possession of the site first or last. This was not a right which carried over from territorial days.

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[4] Appendix 6 gives citations to the federal regulations opening areas generally to fish traps and closing other areas. Particular areas or sites are not identified as belonging to anyone. See Appendix 7 as to fish trap locations actually fished by Appellants Kake and Angoon or their predecessors since 1945.

II

CONGRESS HAS NEVER RECOGNIZED INDIAN FISHING RIGHTS. THE STATEHOOD ACT PRESERVED THE STATUS QUO WHICH WAS THE EQUALITY OF ALL CITIZENS. THERE WAS A DISCLAIMER OF STATE JURISDICTION OVER INDIAN PROPERTY, NOT ORDINARY CITIZENS OF INDIAN BLOOD WHEN FISHING.

Congress in Section 4 of the Statehood Act was careful to prevent any express or implied loss or grant of Indian property rights as a result of Alaska's admission into the Union on an "equal footing." Throughout the legislative history of Alaskan statehood bills, the Congressional Committee reports consistently expressed an intent to (1) make no determination of aboriginal rights in Statehood legislation, and (2) to maintain the "status quo" for future legislative action or judicial determination.

Suitable emphasis should therefore be placed upon the words "property" and upon "status quo" in the quotations from the legislative history, *infra*. Above all, it must be noted that Alaska has not, in disclaiming Indian *property* rights which may have been vested on the date of its admission into the Union, disclaimed the right to regulate commercial fishing, such right being one of a political nature and not a property right.

In 1947, the first statehood bill, H. R. 5666, required that the State disclaim right and title to Indian property.[1]

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[1] "Second. That said State and its people do agree and declare that they forever disclaim all right and title to . . . all lands lying with its boundaries owned or held by any Indian, Aleut, or Eskimo, hereinafter called native, or by any native tribes the right or title to which shall have been acquired through or from the

The basic intent of Section 2 of H. R. 5666 was to preserve native property rights—not to add or subtract from them but rather to leave the question to future legislative action or judicial determination.[2]

Language similar to H. R. 5666, *supra*, was contained in a subsequent statehood bill and a similar intent to maintain the status quo was expressed.[3] The Senate of the 81st Congress added the parenthetical phrase "(including fishing rights)"[4] and a Senate report observed:

> "The new State would have the same control over the invaluable fisheries and wildlife within its borders as do other States of the Union, subject only to the limitations of *international agreements*, such as that affecting seals and native rights to fish and wildlife.[5] (Emphasis added)

The foregoing report does not provide a basis for the assertion that the State was "deprived of any con-

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United States or any prior sovereignty, and that until the title of the United States or of such native or native tribes shall have been disposed of or extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. . . ."

[2] ". . . As proposed to be amended this paragraph would preserve all existing valid native *property rights* in Alaska, including those derived from use or occupancy, together with all existing authority of the Congress to provide for the determination, perfection, or relinquishment of native *property rights* in Alaska. *It would neither add to nor subtract from such rights and such authority, but would simply maintain the status quo.* H. R. Rep. No. 1731, 80th Cong. 2d Sess. 31 (1948). (Emphasis added)

[3] H.R. 331, 81st Cong., 1st Sess. (1949); H.R. Rep. No. 255, 81st Cong., 1st Sess. 13 (1949).

[4] S. Rep. No. 1929, 81st Cong., 2d Sess. 1-2 (1950).

[5] Id. at 11.

trol over native fishing" (M. Br. 34) because Appellant has not and cannot cite any *international agreement* applicable to this case. For examples of international agreements pertaining to native fishing and hunting, see COHEN, FEDERAL INDIAN LAW (revised by the U.S. Department of Interior, 1958) 946, 947.

Properly, the intent of Congress has consistently been to avoid granting any new native rights or denying any old rights in statehood legislation. Section 203(2) of H. R. 2535, 84th Cong., 1st Sess., contains language similar in all important respects to the language which finally became Section 4 of Public Law 85-508, 72 Stat. 339 (1958) [6] the Committee Report stated the following:

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[6] For convenience and so that a ready comparison can be made, Section 203(2) of H.R. 2535, 84th Cong., 1st Sess., is contained below with brackets indicating material deleted and italics indicating material added by Section 4 of Public Law 85-508, 72 Stat. 339 (1958):

> "*As a compact with the United States* [That] said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or its subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee

"Second. The State and its people disclaim all rights and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of the enabling act. Said disclaimer clause is to apply where the right or title in such property (including fishing rights) is either held by or subject to disposition by the United States. *It is provided that no attempt will be made to deal with the legal merits of the indigenous rights but to leave the matter in status quo for either future legislative action or judicial determination.*" (Emphasis added) H. R. Rep. No. 88, 84th Cong., 1st Sess., 47.

The Committee report [7] relied upon by the 85th Congress when it enacted the Statehood Bill [8] found in regard to Section 4 of that Act:

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without restrictions on alienation: [and] *Provided, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: And provided further,* That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation."

[7] H. R. Rep. No. 624, 85th Cong., 1st Sess. 19.

[8] Public Law 85-508, 72 Stat. 339 (1958).

"Finally the section provides that no attempt will be made to deal with the legal merits of the indigenous rights but to leave the matter in status quo for either future legislative action or judicial determination." (Emphasis added)

The Secretary of Interior construes "status quo" to mean the continued fishing by natives as it existed the "instant before statehood" and that he therefore cannot enlarge or diminish native fishing despite conservation requirements—now or in the future. That is, he cannot regulate Indians fishing and takes the further position that the state cannot regulate the activity. (See, Solicitor General's Brief 38) The Justice Department construes "status quo" to mean that the Secretary of Interior can regulate Indian fishing to the exclusion of the State. The State construes "status quo" to mean that there is no exclusive right or franchise to the common fishery and that it is open to all United States citizens regardless of race—as it always has been.

Clearly, the intent of Congress was to maintain the *status quo*. If the actual language of Section 4 is ambiguous, then under the rule of *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, the Act will be construed against the granting away of the public fishery for this Court said:

> "It would take specific and unambiguous legislation to cause us to rule that Congress intended to authorize the Secretary of the Interior to alienate the Alaska fishery permanently from public control . . ."
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> * * * * * * *
>
> ". . . If that power were broad enough to enable the Secretary to designate non-revocable or perma-

> nent reservations of all Alaska fishing grounds for the *sole benefit of natives living in villages and adjacent to the fisheries,* it might place in his hands the power to grant the natives the right to exclude all other fishermen from the fisheries." 337 U.S. at 104-105. (Emphasis added)

Mere legislative innuendo is not enough.

> ". . . Such references to general legislation on public lands in the huge Territory of Alaska, however, cannot be treated as an adequate basis for courts to declare that power was given the Secretary of the Interior to dispose finally of Alaska lands . . . " 337 U.S. at 109.

A. In the Bilateral Statehood Compact the People of the State and Its Constitution Contemplated Equality of All Citizens and No Fish Traps.

In construing a bilateral compact, the intent of both parties must be considered. The State Constitution contemplated that the *status quo* of native fishing rights would be preserved.[1] The court below ruled that insofar as state law is concerned there was no cession of jurisdiction and the constitutional ban in regard to fish traps applied to all who enjoyed and used the common fishery.

Article XII, Section 12 of the Alaska Constitution contains a disclaimer of native fishing rights "as that

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[1] Appendix 8, Record, 64th day, January 25, 1956, Alaska Constitutional Convention shows that the Convention Committee proposal No. 16 was taken from the language of H. R. 2535 (*supra*, at note 6) of the 84th Cong., 1st Sess., which as we have shown contemplated the maintenance of the *status quo*.

right or title is defined in the act of admission."[2] No such definition exists in the act of admission or elsewhere.[3] The constitutional ban on fish traps is most

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[2] ARTICLE XII, SECTION 12, CONSTITUTION OF THE STATE OF ALASKA:

"The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, *as that right or title is defined in the act of admission.* The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation." (Emphasis added)

[3] The *only* specific reservations of exclusive jurisdiction to the United States are found in Sections 10 and 11 of the Alaska Statehood Act, 72 Stat. 339 (1958). Section 10 provides in part as follows:

> "(c) Effective upon the issuance of such Executive order or proclamation, exclusive jurisdiction over all special national defense withdrawals established under this section is hereby reserved to the United States which shall have sole legislative, judicial, and executive power within such withdrawals. . . ."

Section 11, reserving exclusive jurisdiction in the federal government over Mt. McKinley National Park, provides in part as follows:

> "(a) Nothing in this Act shall affect the establishment, or the right, ownership, and authority of the United States in Mt. McKinley National Park, as now or hereafter constituted; but exclusive jurisdiction, in all cases, shall be exercised by the United States for the National Park: . . ."

specific[4]—it pertains to only one of the many types of fishing gear. The disclaimer contained in Article XII, Section 12 of the State Constitution[5] is most general in its application as is Section 4 of the Enabling Act. Ordinance No. 3 (banning fish traps) and Article VIII, Section 15 of the State Constitution which provides that:

> "No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

were "accepted, ratified and confirmed" by Congress.[6]

The lower court judge (who held his position under appointment, not by the State, but by the President of the United States) understood the economy of Alaska and accordingly took judicial notice of the rapid depletion of the salmon runs (R. 61), the decision of the people of Alaska to abolish fish traps (R. 61), and the vote by these Appellants for the abolition of fish traps (R. 60).[7]

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[4] "As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State." ORDINANCE 3, ALASKA CONSTITUTION.

[5] See *supra* at page 33, note 2.

[6] Alaska Statehood Act, Section 1, 72 Stat. 339 (1958).

[7] The Alaska Native Brotherhood, after these Appellants had operated fish traps in 1959, passed a resolution opposing the traps—the only traps in Alaska. See Statement of the Case, *supra* at page 5, note 9. A graphic and accurate description of the feelings of the people of Alaska is contained in GRUENING, STATE OF ALASKA (1954).

B. The Unilateral Amendment of the Compact by Congress Was Not Intended and Cannot Operate to the Detriment of the State.

The Omnibus Act does not affect this litigation.[1] Section 4 as it was ratified by the people of the State provided essentially a disclaimer of undefined property rights (including undefined fishing rights) and appar-

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In discussing legislation pending before Congress in the late 1940's, GRUENING recounts as follows (pages 397-399):

"Ralph J. Rivers, Attorney General of Alaska, voiced the prevailing Alaskan opposition 'to enactment of S. 1446 or any similar measure which *would establish a vested interest in fish-trap sites* and hereby in effect award to a favored few a major share of a natural resource which should be available to all.'

"Most striking was the unanimity of protest from the native communities of southeastern Alaska to which it had been the Interior Department's purpose to allocate some of the surrendered traps. From Klawock, the *President of the Alaska Native Brotherhood*, Frank Peratrovich, wrote:

" 'It is recognized by the people of Alaska . . . this bill is the canned-salmon industry's bill. It is being pushed . . . by the powerful lobbyists of the industry . . . to legalize their methods of completely depleting our major resource of the territory. When this is accomplished they will move to greener pastures . . . and we, the people of the territory, will be left to carry on.

" 'Through a period of fifteen years the fishermen and residents . . . have come to realize that the fish trap must be completely eliminated if we are to maintain an average run of salmon and the agitation against the trap has increased within the past four years due to the fact that the decline in the run of salmon is directly traceable to this method of taking salmon. If this bill is allowed to pass, maybe the government will be willing to give Alaska to the Indians after the industry gets through with it. I hope this does not happen.'

"The *President of the Alaska Native Sisterhood*, Mrs. Amy Hollingstad of Petersburg, and the presidents and secretaries of

[Footnote 1 on Page 36]

ently disclaimed "absolute jurisdiction and control" only over lands and other property. Noticeably absent from the disclaimer of jurisdiction and control was the term "(including fishing rights)". Section 4 under analysis logically divides itself into two clauses: (a) a disclaimer of undefined property and fishing rights, and (b) a cession of "absolute jurisdiction and control." In clause (b) the blank bracket indicates a conspicuous absence of the phrase "(including fishing

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the A.N.B. and A.N.S. camps of Hydaburg, Ketchikan, Yakutat, *Angoon*, Haines, Juneau and Douglas all transmitted their opposition for the committee's record.

"No further action was taken on the bill.

"The referendum taken in Alaska the following October 12th resulted in a vote of 19,712 to 2,624 for trap abolition. It was a demonstration that the people of Alaska, and not merely the fishermen, were against fish traps. Of the 22,336 who had voted, 88.7 percent took that position. While the First and Third Divisions whose coasts harbored the fisheries gave the largest percentage vote against traps, the Second and Fourth, where there were no fish traps, returned majorities in excess of three to one and nine to one, respectively. Again it was impressively shown that the Tlingit and Haida communities—to whom the bestowal of traps had been held out earlier in the same year by the Department of the Interior in its advocacy of the fish-trap leasing bill—were nevertheless wholly opposed, as they had been ever since the introduction of traps, and voted against them overwhelmingly and in ratios exceeding the votes of white communities: *Angoon, forty-one to nine;* Hoonah, 106 to eleven; Hydaburg, eighty-one to three; *Kake, 123 to six;* Kasaan, twenty-nine to nothing; Klawock, eighty-four to four; Yakutat, forty-six to three. *Most striking of all was that Metlakatla with seven traps belonging to the community, voted 112 to thirty-three for trap abolition."* (Emphasis added)

[1]Alaska Omnibus Act, 73 Stat. 141 (1959). Section 2 of the Omnibus Act amended the language of Section 4, of the Statehood Act.

rights)". Section 4 provides in pertinent part, as follows:

> "As a compact with the United States said people do agree and declare;"
>
> [a] "that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives;"
>
> [b] "that all such lands or other property [ ], belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe . . . " (Brackets added)

If it was intended that the people of Alaska as a condition of entry into the Union cede control of their major resource, then in all fairness the parenthetical phrase "(including fishing rights)" should have been inserted in clause [b].

The addition made by the Omnibus Act of the parenthetical clause "(including fishing rights)" to clause [b] *after* ratification by the people of Alaska cannot operate as a cession of jurisdiction and control over the fishery. A bilateral compact between the State and

the United States cannot be amended unilaterally to the detriment of a non-consenting party.[2]

However, Congress did not intend to amend the Statehood Act to the detriment of the State. Senate and House-Interior Committee reports[3] stated that the purpose of the amendment was to clarify an ambiguity and to clarify State jurisdiction over the general public domain. The insertion of the phrase "(including fishing rights)" in the process of accomplishing the above purpose gives no insight into the intent of Section 4 as *originally enacted* and *ratified* by the people of Alaska.

If it was the intent of Congress to deprive Alaska of control of the fishery and it was necessary to clarify ambiguous language in Section 4 as it originally was enacted to accomplish this purpose, then not only is this a unilateral amendment to the compact but it strengthens our interpretation that as *originally enacted* and *ratified* Section 4 could not work a cession of jurisdiction over Indians' fishing.[4]

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[2] *Boeing Aircraft Co.* v. *Reconstruction Finance Corp.*, 25 Wash. 2d 652, 171 P.2d 838, 842 (1946), appeal dismissed *sub. nom.*, *Boeing Aircraft Co.* v. *King County*, 330 U.S. 803, where the court said:

> ". . . However, after the state had accepted the terms of the enabling act by framing and passing a constitution, and Congress had approved the constitution, and the President of the United States had issued a proclamation to that effect, each government was bound by the provisions of *that* enabling Act." (Emphasis added)

[3] S. Rep. No. 331, 86th Cong., 1st Sess. 9 (1959); H. R. Rep. No. 369, 86th Cong., 1st Sess. 6 (1959).

[4] Section 6(e) indicated the intent of Congress to turn over to the State all Federal real and personal property used for the conservation and management of fish and wildlife except that used for research purposes. Congress did not contemplate that the

The refusal of Congress to dispose of the "unrivaled sea fisheries with their wealth of food" is based upon the "unarticulated premise" that the fisheries must be protected, improved and regulated "for the good of all our people."[5] The premise did not suddenly change when Alaska became a state. Alaska urges the same premise *today.*

III

STATEHOOD TRANSFERRED MUNICIPAL JURISDICTION OF INLAND WATERS TO THE STATE. A RESERVATION OF MUNICIPAL JURISDICTION IN THE U. S. MUST GEOGRAPHICALLY BE CERTAIN OR FALL.

All the waters in question are inland waters which were held in trust before statehood for the benefit of the future state and were not withheld from the State by ambiguous language or by implication.

Appellants have not contested the mixed findings of fact and conclusion of law by the lower court that the waters surrounding the islands which make up the Alexander Archipelago are inland waters of the State. (R. 67-69)[1] Truly such a finding cannot be disputed, for in fact southeastern Alaska is essentially an island empire. The salt water bays, inlets, and channels form the only means of surface transportation and communi-

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[1] For a description of the special geographic circumstances existing in Alaska, and the methods for determining seaward limits of inland waters, see *Pearcy, Measurement of the U.S. Territorial Sea,* Department of State Publication, No. 6879 (1959).

[*Footnote 4 continued*]

Federal government would retain management of the natives who constitute 42% of the Alaskans engaged in the fishing industry (*supra* at page 8, note 13) and therefore gave the state all the property previously used to manage the fishing activities of *all persons.*

[5] *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86, 106.

cation in the area. The principal cities, towns and villages of the area are not connected by road or trail. These waters contain, in the form of migratory salmon, not only the major industry of the whole of southeastern Alaska, but in many areas the only industry and practically all communities in the area are in effect fishing villages oriented to the marine way of life. (R. 68) This is true not only of the Indians in the area but also the whites.

United States v. *California,* 332 U.S. 19, and the subsequent Submerged Lands Act,[2] particularly the reservation of §1311(b) pertaining to Indians, have no effect in the present litigation due to the fact that this litigation involved inland waters as contrasted with the marginal sea.[3] *United States* v. *California, supra,* and the Submerged Lands Act, *supra,* arose from a relatively recent development in which lands located beneath the waters of the outer three-mile belt became important for purposes of mineral exploration and development.

The common right to fish in inland waters dates back to "King John's Great Charter."[4] The instant litigation concerns *sovereign rights* which have long been recognized in English and American law leading to a *sovereign duty* to maintain the fishery for the benefit of all the citizens, granting special privilege or franchise to none. There is no state in the Union where

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[2] 67 Stat. 30 (1953), 43 U.S.C. §§ 1311-1315 (1959).

[3] Appellants have failed to make the distinction between inland waters and the marginal sea. For example, Metlakatla erroneously urges at page 44 of its Brief that the Submerged Lands Act applies to inland waters.

[4] See Book II, Blackstone 764-765 (Jones ed. 1916).

this has more meaning than Alaska, where the largest natural resource industry is located in waters which bear an intimate relationship to the uplands. The principle is well established that a state has sovereignty over its tidelands and inland waters. Accordingly, denial of jurisdiction over tidelands and inland waters would deny a state that essential equality which is the basis of the Union.[5]

In discussing the case of *Manchester* v. *Massachusetts,* 139 U.S. 240, relative to the very waters under consideration, the Ninth Circuit Court of Appeals [6] observed that:

> "The jurisdiction exercised by the Commonwealth of Massachusetts over the waters of Buzzard's Bay is the jurisdiction which the United States has over the waters of Alaska; and, under the law as declared in the case just cited and in *Weber* v. *Harbor Commissioners, supra,* the appellants have acquired no rights, vested or otherwise, to construct or maintain a fish trap within the waters reserved by the President's proclamation. . . ."

On appeal this Court in *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, reaffirmed the above ra-

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[5] *Martin* v. *Waddell,* 16 Pet. 367; *Pollard Lessee* v. *Hagen,* 3 How. 212; *Shively* v. *Bowlby,* 152 U.S. 1; *United States* v. *California,* 332 U.S. 19; *United States* v. *Louisiana,* 340 U.S. 899, enforcing 339 U.S. 699; *Weber* v. *Harbor Commissioners,* 18 Wall. 57, 65; *Escanaba Co.* v. *Chicago,* 107 U.S. 678; *United States* v. *Texas,* 339 U.S. 707.

[6] *Alaska Pacific Fisheries* v. *United States,* 240 Fed. 274, 281 (9th Cir. 1917) *affirmed* 248 U.S. 78.

tionale and stated that not only the uplands, but also the adjacent waters and submerged lands:

> "... were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. *National Bank* v. *County of Yankton,* 101 U.S. 129, 133; *Shively* v. *Bowlby,* 152 U.S. 1, 47-48, 58; *United States* v. *Winans,* 198 U.S. 371, 383. The reservation was not in the nature of a private grant, but simply a setting apart *'until otherwise provided by law,'* . . . ." (Emphasis added) 248 U.S. at 87-88.

The contingency (spelled out by this Court in the *Alaska Pacific Fisheries* case, *supra,*) "until otherwise provided by law," has occurred. By *operation of law* the exclusive right to fish given to the Metlakatlans in a certain area by a questionable Presidential Proclamation has fallen due to the fact that municipal jurisdiction no longer rests in the federal government, but rather in the state.

If, however, this Court rejects the argument that the 3,000 foot Metlakatla reservation fell by *operation of law* then it can be shown that due to vague and indefinite geographical limits, the reservation cannot be sustained.

Jurisdiction, at least in a geographical sense, must be certain for as a fish or fisherman approaches the Annette Islands, the State cannot lose jurisdiction by degrees and the United States gain jurisdiction by degrees. At some point geographically, the fish and the fisherman must leave state jurisdiction and enter federal jurisdiction. The severity of penalties for vio-

lations of fisheries laws demonstrates the practical necessity of being able to ascertain the precise limits of state or federal jurisdiction. Thus, the term "surrounding waters" as used by this Court in the *Alaska Pacific Fisheries* case, *supra,* is insufficient.

The issue is therefore: What is the boundary of the Metlakatla reservation? The reservation was created in 1891 by Statute,[7] and was described as "the body of lands known as Annette Islands." In 1916, a Presidential Proclamation[8] purportedly extended the reservation to the "waters within three thousand feet from the shore lines at mean low tide . . ." and stated "Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the water described . . ." In *Alaska Pacific Fisheries* v. *United States,* 240 Fed. 274 (9th Cir. 1917) an injunction was brought by the United States against an intruder into the 3,000 foot area. The Ninth Circuit Court sustained the position of the United States on the grounds that the Presidential Proclamation was valid. In the same case (248 U.S. 78, 89) this Court apparently deemed the rationale of the Court of Appeals unacceptable, declined to dignify the Presidential Proclamation by mentioning it, and affirmed the Circuit Court stating that the *statutory reservation* describes "The body of lands known as Annette Islands" and that this description included the "surrounding waters."[9]

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[7] Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358.

[8] Presidential Proclamation No. 1332, April 28, 1916, 39 Stat. 1777.

[9] In attempting to determine the boundaries of the Metlakatla reservation, the dicta cited by Appellant Metlakatla (M. Br. 26, 27) from *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86, 113-114 cannot

This geographical definition of the boundary may have been sufficient when the United States exercised *both* municipal and Federal sovereignty and therefore exercised "complete legislative authority" [10] over all the lands and waters. Appellee submits, however, that as a jurisdictional line of demarcation between state and federal authority, the term "surrounding waters" is clearly insufficient.

Terms such as "marginal sea", "outer belt", and "inland waters" have precise legal meaning. If one were speaking of a continent, the term "surrounding waters" would be equivalent to the terms "outer belt" or "marginal sea." However, in the case of the Annette Islands, a line of demarcation of Federal-State criminal jurisdiction is required for the purposes of executing the fishery laws. The term "surrounding waters" is totally inadequate. Therefore, this reservation of a portion of the waters of Alaska must fall with the advent of statehood because it is vague and indefinite.

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be of assistance. This Court in the *Hynes* case, *supra*, when speaking of the *Alaska Pacific Fisheries* case, *supra*, said:

> "This Court affirmed the decree as to the waters within 3,000 feet of the shorelines."

however, the Court in 337 U.S. at 113-114:

> ". . . felt compelled to decide the fisheries were included in the language of the Statute . . ."

which, of course, *is not 3,000 feet* but rather *"surrounding waters"* as determined by this Court when the question was squarely before it.

[10] *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87.

IV

RACIAL ORIGIN IS INSUFFICIENT TO BRING PERSONS OF INDIAN BLOOD UNDER THE COMMERCE CLAUSE.

The fundamental power of Congress extends only to tribal Indians—not to ordinary citizens of Indian blood.

Appellant Metlakatla makes no claim in their Complaint that it is today constituted as a tribe of Indians. The Appellants Kake and Angoon make no claim to an Indian reservation—either for their community—or the sites of the fish traps. All Appellants rely on the constitutional power of the United States to regulate commerce with Indian tribes. (M. Br. 41; R. 87, 107) The pleadings of Appellants show that they are Federal Indian corporations. (R. 5, 82, 102) This is not sufficient to invoke the operation of the Commerce Clause. Therefore, the question is:

> Assuming (a) that a property right exists to operate a fish trap, and assuming (b) that the effect of Section 4 is to reserve this right to certain natives of Alaska, then query: are these Appellants entitled to claim the special privileges of Section 4?

Members of Appellant Corporations are citizens of the State and the United States. They are subject to State law unless they can bring themselves within the federal power to deal with Indian tribes. A showing of racial origin is insufficient to achieve this.

Congress, during the territorial status of Alaska, had power over Alaskan Indians arising from the absolute authority to govern United States territories.

The advent of statehood leaves only the power to regulate commerce with the Indian tribes.[1]

The development of the law from *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, when Indian tribes were powerful "Indian Nations" to *United States* v. *Kagama*, 118 U.S. 375, when they were a "dependent people," calls for the application of the descriptive language of the *Kagama* case, *supra*, defining the power of the United States over the Indians under the Commerce Clause. In *United States* v. *Kagama*, *supra*, this Court said:

> "They were, and always have been, regarded as having a semi-independent position when they preserved their *tribal relations;* not as States, not as Nations, not as possessed of the full attributes of sovereignty, *but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."* (Emphasis added) 118 U.S. at 381.

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[1] It has been suggested that ownership of the public domain is a vital source of federal power over Indians, COHEN, FEDERAL INDIAN LAW (revised by the U. S. Department of Interior, 1958) 931. This is true perhaps in a proprietary sense, that is, the land could perhaps be given to the Indians and reservations created thereon. Insofar as we are concerned with the violation of state sovereignty (by exempting persons of Indian blood from the operation of state fish and game laws on the public domain, tidelands, and inland waters where there are no Indian reservations) proprietary ownership in the United States is not a source of power. See *Hunt* v. *United States*, 278 U.S. 96; *Chalk* v. *United States*, 114 F.2d 207 (4th Cir., 1940), *cert. denied* 312 U.S. 679.

The facts of the *Kagama* case, *supra,* and the statute there under consideration limited the holding of the case and caused this Court to say:

> "Its effect [the statute] is confined to the acts of *an Indian of some Tribe,* of a criminal character, committed within the limits of the *Reservation.*" (Emphasis and words added) 118 U.S. at 385.

In our Statement of the Case, we have shown the complete integration of the members of Appellant corporations into the political structure of the state as is demonstrated by representation in the state legislature and on the State Board of Fish and Game (Statement of the Case especially notes 8, 13, 16).

The application of the *Kagama* case, *supra,* first to Metlakatla and then to Kake and Angoon will show that they cannot bring themselves within the Commerce Clause of the Federal Constitution.

A. Metlakatla Has Not Pleaded the Existence of a Tribe and Has Always Been Subject to Territorial and State Law Without Discrimination or Special Privilege.

Metlakatla is a heterogeneous community which does not meet the test of a "tribe."

The most recent judicial description of this community is found in *U. S.* v. *Booth,* 17 Alaska 561, 161 F. Supp. 269 (D.C. Alaska, 1st Div., 1958). According to the court, the people living on the Metlakatla reservation consist not only of Tsimpsean Indians from Canada but also Haida and Tlingit Indians, Eskimos and Aleuts, who left other communities of Alaska to take up residence on the Metlakatla reservation.[1] An Eskimo

[1] See also Complaint of Metlakatla (R. 5) where it is stated, "native born Alaskan Indians joined the original settlers. . . ."

served on the Metlakatla city council. The mayor of Metlakatla, as of the date of the opinion, was a Tlingit Indian originally from Sitka, Alaska. The original Metlakatlans (Tsimpseans) renounced aboriginal rights as a condition of entry into the United States.[2] The court also stated:

> "... In the past it has always been assumed that territorial law applied to Metlakatla." 161 F. Supp. at 270.
>
> * * * * * * *
>
> "The residents of Metlakatla pay Territorial [now state] income taxes, school taxes, gasoline taxes and generally all forms of state taxes paid by other residents of Alaska. There has been no reluctance demonstrated by Alaskan authorities to govern the Indians of Southeastern Alaska." (Bracketed words added) 161 F. Supp. at 275.
>
> * * * * * * *
>
> "It would seem that in view of the development of the Indians in Southeastern Alaska and *their participation in every phase of the life and economy of the white man* that every presumption should be indulged in to avoid the effects of racial segregation and discrimination and to recognize the nonexistence of Indian country in Southeastern Alaska...." (Emphasis added) 161 F. Supp. at 272.

They have voted for many years in the election of candidates for the territorial (now State Legislature). They voted to ratify the Constitution of Alaska and Ordinance No. 3 thereof abolishing fish traps. They

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[2] *U.S.* v. *Booth*, 17 Alaska 561, 161 F. Supp. 269 (1958).

voted in the election provided by the Alaska Enabling Act as to whether or not territory should receive statehood. Appellant Metlakatla alleges further in its complaint describing its community that:

> "The town site is divided into streets, alleys, blocks, and lots for residential and commercial purposes. . . . There are churches, homes, and stores; in general, Metlakatla bears a resemblance to any other small town in Alaska."[3]

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[3] The Metlakatla grade and high schools are state schools. It was not always so. In 1950 the Alaska Native Service made a new proposal to the territorial (local government) authorities for the transfer of a number of schools under Johnson-O'Malley contracts, and in 1951 the Area Director officially stated:

> "Plans are being completed whereby all ANS schools will be transferred to Territorial responsibility, in an orderly manner and on a yearly basis, by 1960." ANNUAL REPORT OF THE GOVERNOR OF ALASKA . . . . for the Fiscal Year 1952 (Washington: U.S. Government Printing Office) 80.

The Governor of Alaska commented:

> "This sound and enlightened program is, fortunately, a complete reversal of the policies pursued under a previous Secretary of the Interior creating Indian and Eskimo reservations and segregating the inhabitants thereon. . . . So, the Alaska Native Service's present policy of integration cannot be praised too highly." ANNUAL REPORT OF THE GOVERNOR, *supra* at 5.

See also, THE NATIONAL CONFERENCE AND THE REPORTS OF THE STATE ADVISORY COMMITTEES OF THE U.S. COMMISSION ON CIVIL RIGHTS, 1959 (Gov. Print. Office, 1960) 48 *et seq.*

In COHEN, FEDERAL INDIAN LAW (revised by U.S. Department of Interior, 1958) 941, the following statement is made:

> "The Alaska Native Service maintains schools in 84 villages. During the fiscal year 1957, 4,808 native children were enrolled in the Federal schools, 6,144 in the Territorial schools, and 724 in mission and other schools."

The only apparent difference is that the fee is held by the United States.

Under the test of the *Kagama* case (discussed, *supra* at 46-47):

Have the members of Appellant corporation, Metlakatla, preserved their tribal relations?

They have not pleaded the same.

Are they a separate people?

No, because they have been joined by other peoples as expressly permitted by the statute creating the reservation[4] and as the court said in the *Booth* case, *supra* at 272, they: "participate in every phase of the life and economy of the white man."

Do they possess sufficient attributes of sovereignty to regulate their internal and social relations, and have they thus far not been brought under the laws of the state?

No. It has always been assumed that territorial (now state) law applied. Members of Appellant corporations pay state income, school, gasoline and all other taxes.[5]

B. Kake and Angoon Have Not Pleaded a Reservation, Have No Tribal Organization, Are Incorporated Municipalities Under State Law Without Discrimination or Special Privileges.

Kake and Angoon except for Indian blood are in the same situation as the rest of the Alaskan fishing communities—financially poor, but an integral part of the greater community.

Kake and Angoon in their pleadings do not claim that

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[4] Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. §358.

[5] The Appellant corporations have claimed an immunity from the state raw fish tax. (For example, see R. 84)

either the communities or the fish trap sites are located on an Indian reservation.[6] The canneries are located on land previously held in fee by whites and were conveyed in the instance of Angoon in 1948 and Kake in 1950 (R. 137, 140). The community of Kake was incorporated as a first class city in 1952, and continues as such under the laws of the State of Alaska.[7] The order of incorporation recites that in excess of 100 bona-fide residents and inhabitants of the community petitioned the court to incorporate. After a hearing by the Court, an election was held at which 128 votes were cast for incorporation and 7 against. The mayor, councilmen and school directors were elected.

Angoon was incorporated many years ago as a village under local (territorial) law as distinguished from federal law.[8] These Appellants have been governed by State law the same as every other community in Alaska ever since the institution of civil government in Alaska. They have received different types of support from the federal government by way of health, welfare, education, etc., as have many communities in Alaska. Admittedly, with the critical depletion of migratory salmon resources under federal management, these villages *and others like them* have received territorial, state and federal welfare assistance as "depressed areas."

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[6] Apparently their communities are located in or on the edge of the Tongass National Forest. See *Tlingit and Haida Indians of Alaska* v. *United States*, 177 F. Supp. 452 (Ct. Cl. 1959) and maps at 455 and 469. (See also R. 83, 103)

[7] See Appendix 9 for territorial district court order of "The matter of Incorporation of the City of Kake as a first class municipal corporation." Case No. 6688-A.

[8] COHEN, FEDERAL INDIAN LAW (revised by U. S. Department of the Interior, 1958) 960, footnote 2: ". . . villages like Angoon and Hoonah, organized before repeal of this law, continued to function although their status is doubtful."

The members of Appellant corporations Kake and Angoon are alleged to be "of the Thlinget Indian tribe." (R. 83, 102) This allegation is only a statement of racial origin and does not constitute a present claim of tribal organization, laws, or government.[9]

Although there may be some question as to the nature of the early tribal organizations, the United States Court of Claims as recently as October 15, 1959 stated:

> "Neither the Tlingits nor the Haidas were organized politically in a manner resembling the tribal organizations of the Indians of the United States." *Tlingit and Haida Indians of Alaska* v. *U. S.*, 177 F. Supp. 452, 454 (Ct. Cl. 1959)

As early as 1886 the existence of a tribal organization (a matriarchy) was nebullous[10] and had apparently disappeared prior to 1952.[11]

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[9] In *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, the Court found that the Tee-Hit-Tons were an identifiable group of Alaskan Indians within the terms of a jurisdictional act. In dicta, the Court discusses the existence of Alaskan Indian tribes at a time not stated but remote. We believe that the use of the word "tribe" in relation to the claim for monetary consideration was not a finding of presently existing tribal organization of Tlingit Indians.

[10] *In re Sah Quah*, 31 Fed. 327 (D. Alaska, 1886) states the following:

> "From the organization of the government to the present time, the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their tribal laws and customs, in all matters pertaining to their internal affairs, such as contracts and the manner of their enforcement, marriage, descents, and the punishment for crimes committed against each other. They have been excused from all allegiance to the municipal laws

[Footnote 11 on Page 53]

As is true of Metlakatla, both Kake and Angoon enjoy state schools, (see discussion, *supra,* footnote 3 at page 49) and have exercised all territorial and state political rights.

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of the Whites as precedence or otherwise in relation to tribal affairs. . . .

". . . *but does the rule . . . apply to the Indians of Alaska?* I think not, and for various reasons. The United States has at no time recognized any tribal independence or relations among these Indians, has never treated with them in any capacity, but from every Act of Congress in relation to the people of this territory it is clearly inferable that they have been and now are regarded as dependent subjects, amenable to the penal laws of the United States, and subject to the jurisdiction of its courts. Upon a careful examination of the habits of these Natives, of their modes of living, and their traditions, I am inclined to the opinion *that their system is essentially matriarchal, and not tribal, as we understand that term in its application to other Indians.* . . . " (Emphasis added)

[11] The court stated in the case of *United States* v. *Libby McNeil & Libby,* 14 Alaska 37, 107 F. Supp. 697 (D. C. Alaska, 1st Div., 1952) as follows:

". . . in the ensuing 54 years the Indians of southeastern Alaska, and particularly the Haidas, *have not only abandoned their primitive ways and adopted the ways of civilized life but are now fully capable of competing with the White in every field of endeavor* . . . it is a matter of common knowledge that today the Indians of southeastern Alaska prefer the White man's life despite all its evils and shortcomings . . .

"Whatever may be said in justification of reservations in the unsettled regions of Alaska, they are viewed as indefensible in southeastern Alaska, and generally condemned by Whites and Indians alike as racial segregation and discrimination in the worst form . . ." (Emphasis added) 107 F. Supp. at 699.

Under the test of the *Kagama* case (discussed, *supra* at 46, 47):

Have the members of Appellant corporations preserved their tribal relations?

No. If a tribal organization ever existed, it has apparently disappeared.

Are they a separate people?

No. Racially, they may be Thlingit Indians but from the standpoint of trade, commerce, social intercourse, and the exercise of political rights, they are part and parcel of the greater Alaskan community composed of whites and natives.[12] They do not live on a reservation.

Do they possess sufficient attributes of sovereignty to regulate their internal and social relations, and have they thus far not been brought under the laws of the State?

No. Both Kake and Angoon incorporated under state (previously territorial) law. Kake is a first class city and Angoon is a village whose incorporated status is questionable. The petition for incorporation of Kake addressed to the Territorial Court in 1952 clearly indicates a voluntary relinquishment of tribal government if in fact it had not disappeared long before that time.

It has always been assumed that territorial and now state laws applied to both the communities in question and Metlakatla. Kake and Angoon have not pleaded exclusion from state law generally, whether these laws relate to schools, welfare, public works, unemployment compensation, the exercise of the state elective fran-

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[12] *United States* v. *Libby McNeil & Libby*, *supra* note 11.

chise, or state income, gasoline, tobacco or school taxes.[13]

Congress has recognized the questionable tribal status of the Alaska natives by passing an amendment to the Indian Reorganization Act of 1934 [14] which would permit Alaskan Indians to incorporate as federal Indian corporations, receive federal loans, and conduct business activities even though such corporations were formed from groups which were neither recognized as Indian tribes nor living on reservations. The amendment provides:

> "Sections 461, 467, 468, 475, 477 and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska: *Provided,* That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title."

The three Appellant corporations received their corporate charters pursuant to the above amendment, and all but three of a total of 59 such corporations [15] organized in Alaska under instructions of the Secretary of

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[13] Two exemptions from state laws are claimed by Kake and Angoon. One, an exemption from the raw fish tax on canning, and two, an exemption from the statewide fishing law (and constitutional ordinance) banning fish traps.

[14] 49 Stat. 1250 (1936), 48 U.S.C. § 362.

[15] COHEN, FEDERAL INDIAN LAW (revised by the United States Department of Interior, 1958) 962-963, note 14.

Interior indicating the primary purpose of incorporation was to facilitate business activities.[16] This does not make Appellants "tribal" as required by the Commerce Clause.

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[16] COHEN, *id.* at 962 reads as follows:

"The instructions on organization in Alaska, approved by the Secretary of the Interior on December 22, 1937, set forth the kinds of organization possible under the act:

"(1) A group consisting of all the native residents of a locality *may organize to carry on municipal and public activities as well as economic enterprises.* This type of organization would be suitable for exclusively native villages. Authority for municipal activities is based on the provision of section 16 of the act of June 18, 1934, providing that the constitutions may contain all powers of an Indian group recognized under existing law. The best example of this type of organization is the organization of the Eskimo villages.

"(2) Groups comprising all the native residents of a locality may *organize solely for business purposes without contemplating municipal activities. This type of organization is specially suitable in the case of Indian groups residing in white communities,* which communities already provide for municipal activities. Examples of such an organization are the organizations at Craig and Sitka.

"(3) *A group not comprising all the residents of a locality but comprising persons having a common bond of occupation or association may organize to carry on economic activities.* In the case of such organizations, cooperative and democratic features in the method of organization are encouraged and as wide a base among the natives is sought as is possible in the circumstances of the case. An example of such an organization is the Hydaburg Cooperative Association, composed of resident native fishermen of Hydaburg who have a common bond of occupation in the fish industry, including the catching, processing, and selling of fish and the building of fishing boats and equipment." (Emphasis added)

V

THE EQUAL FOOTING DOCTRINE PROHIBITS DISCRIMINATION AGAINST ALASKA IN THE CONTROL OF ITS FISH AND GAME, ITS INLAND WATERS AND ITS ORDINARY CITIZENS OF INDIAN BLOOD.

The Union Is Composed of Equal States.

(a) *Fish and Game.*

If the Court rules that Alaska has disclaimed absolute jurisdiction and control over all Indians fishing so as to leave a critical segment of the population outside the scope of state control, then the equal footing doctrine is squarely raised through failure to protect the vital state power to regulate fish and game as recognized in the following representative cases: *Geer* v. *Connecticut,* 161 U.S. 519; *Ward* v. *Race Horse,* 163 U.S. 504; *Patsone* v. *Pennsylvania,* 232 U.S. 138; *Kennedy* v. *Becker,* 241 U.S. 556; *Lacoste* v. *Dept. of Conservation,* 363 U.S. 545; *Tulee* v. *Washington,* 315 U.S. 681.

It is necessary to observe that those cases dealing with Indians' rights versus the power of the state to regulate and protect fish and game, e.g., *Ward* v. *Race Horse, supra,* and *Kennedy* v. *Becker, supra,* each upholding state regulatory power over fish and game, were cases dealing with tribal Indians. In the present litigation members of Appellant organizations are not tribal. This gives additional strength to the position of the State.

(b) *Inland Waters.*

We rely on the cases which we have previously cited in support of state jurisdiction over inland waters as

well as our previous argument that if *Appellants'* construction of Section 4 is a correct interpretation of the bilateral compact, the State of Alaska will have been denied equality, and Section 4 must be declared unconstitutional to the extent that it violates the equal footing doctrine. Control and regulation by Alaska of inland waters is unquestionably essential to equality with the other states.

(c) *Political rights.*

The equal footing doctrine is raised not only in relation to the state power to conserve fish and game and to exercise sovereignty over inland waters but also in relation to the state power to regulate and legislate for its own citizens where those citizens are not members of an Indian tribe nor living within an area wherein absolute jurisdiction and control is vested in the federal government, e.g., McKinley National Park (see Section 11 of the Statehood Act, 72 Stat. 339 [1958]). The denial to Alaska of political power over state citizens is much more serious than the denial to Oklahoma of the political power to move its state capitol, which was condemned by this Court in *Coyle* v. *Oklahoma,* 221 U.S. 539.

Appellants apparently claim that the State has ceded absolute jurisdiction and control over Indians as individuals without regard to tribal organization and in the instances of Kake and Angoon without regard to Indian reservations, when they begin to fish in any area of Alaska. Query: Has the State disclaimed absolute jurisdiction and control over the President of the First State Senate, Senator Beltz, a full blooded Eskimo from Unalakleet, Alaska when he drops a hook and begins to fish in State waters?

Appellant Metlakatla cites the acts of admission of other states of the Union which show that the cession of absolute jurisdiction and control must apply to a given area, i.e. "Indian Lands." (M. Br. 42) Inherent in the foregoing argument is the requirement of certainty. The disclaimer here fails to meet the test of certainty. As Appellant Metlakatla states:

> ". . . disclaimer provisions have been uniformly construed as excluding the authority of the State from the *area specified* . . . " (Emphasis added) (M. Br. 42-43)

In the Alaska Statehood Act jurisdiction is purportedly ceded over "such lands and other property" which "may"[1] be held by any natives or "is held by the United States in trust for said natives." The word "may," emphasized above, supports our argument that no grant was involved but only the preservation of the *status quo,* i.e., the right to assert a claim. How could there be a present ceding of jurisdiction over land the description of which will be known only if, sometime in the future, that land is successfully claimed in a law suit? Lands or other property "held in trust" by the United States must be equally certain as to description. Clearly, however, they *are not* the inland waters of the new state.

The federal power to foster and protect dependent Indian tribes required no cession of jurisdiction by Alaska for that power is an incident to the sovereignty

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[1] The word "may" was intentionally used to preserve the *status quo.* See Hearings before the Committee on Interior and Insular Affairs of the House, on Hawaii-Alaska Statehood, 84th Cong., 1st Sess. (1955) at 334 and 335.

of the Nation. By the same reasoning that power could not be augmented by virtue of a purported disclaimer by a State as a condition of entry into the Union.

We submit that no state has ever ceded the power to regulate a particular activity (e.g., Indians fishing) without regard to location. It is clear beyond doubt that the Commerce Clause does not give the Federal Government jurisdiction and control over Senator Beltz because of his race. The State does not lose the power to regulate Senator Beltz when he goes fishing because of his race, and the term "absolute jurisdiction and control" as applied to Senator Beltz is either surplusage [1] or is unconstitutional. The same is true of Appellants—none of which meets the definition of "tribe" and two of which have no reservation.

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[1] As an example of surplusage in an enabling Act, see *United States* v. *Board of Com'rs.*, 271 Fed. 747, 749-750 (E.D. Okla., 1921) affirmed in *United States* v. *Ransom*, 284 Fed. 108 (8th Cir. 1922), *affirmed per curiam* 263 U.S. 691.

CONCLUSION

The commercial fishing season will start in June. These Appellants must incur very large expenditures of funds to prepare and install fish traps—an expenditure that they can ill afford—unless Appellants prevail. State fishing regulations directed to conservation must be revised to allow for the efficiency of traps—if Appellants prevail. We urge that this Court rule on the merits, if possible, and finally lay to rest a controversy which by its nature continues to grow with each passing day.

The State of Alaska respectfully submits that the judgment of the District Court for the Territory of Alaska should be affirmed.

Dated at Washington, D. C., this 9th day of May, 1960.

Respectfully submitted,

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APPENDIX

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APPENDIX 1

Department of the Interior
United States Fish and Wildlife Service
Bureau of Commercial Fisheries
Alaska Region

Preliminary Alaska Commercial Fisheries Statistics—1959

These data were compiled by the Statistical Unit of the Bureau of Commercial Fisheries in Juneau, Alaska. All statistics are preliminary until printed in the Alaska Fisheries Leaflet (Annual Summary). Pounds and values are rounded to the nearest thousand.

Table 1—Catch Statistics

	Pounds [1]	Value to Fishermen
Salmon	147,278,000	$20,956,000
Herring	107,444,000	1,294,000
Halibut	29,974,000	4,298,000
Sablefish	2,355,000	179,000
Other (trout, bottomfish, etc.)	28,000	3,000
Clams	1,126,000	131,000
Crabs	22,053,000	1,738,000
Shrimp	13,052,000	506,000
Grand Total	323,310,000	$29,105,000

[1] Reported as whole round weight.

Table 2—Production Statistics

(Volumes and values of products prepared for market.)

Canned Products	Standard Cases	Pounds	Value
Salmon	1,778,289	85,358,000	$49,493,000
Steelhead trout	50	2,000	1,000
Clams	21,001	315,000	446,000
Crabs	70,907	1,383,000	1,777,000
Shrimp	104,327	1,565,000	1,686,000
Total	1,974,574	88,623,000	$53,403,000

Fresh, Frozen, and Cured Products:		
Salmon	13,273,000	$ 6,742,000
Halibut	26,051,000	6,057,000
Herring	4,696,000	231,000
Sablefish	1,818,000	345,000
Other	31,000	5,000
Crabs	3,989,000	2,930,000
Shrimp	400,000	342,000
Sea Lion	223,000	24,000
Kelp with herring eggs	108,000	36,000
Total	50,589,000	$16,712,000
Byproducts:		
Herring: Meal	16,189,000	$ 1,116,000
Oil (1,778,248 gallons)	13,337,000	898,000
Solubles (70,620 gallons)	706,000	18,000
Fur Seal: Meal	659,000	26,000
Oil (39,307 gallons)	295,000	18,000
Shrimp: Meal	178,000	12,000
Total	31,364,000	$ 2,088,000
Grand Total	170,576,000	$72,203,000

APPENDIX 2

TABLE 11 [1]

Products—1949–53	Southeast		Central & Interior		North & West	
	Thous. $	%	Thous. $	%	Thous. $	%
	(Annual average values)					
Commercial fisheries (wholesale)	40,307	85.9	31,984	57.2	17,566	61.3
Furs (raw)	842	1.8	594	1.1	3,239	11.3
Other tangible wildlife values[2]	1,135	2.4	4,600	8.2	2,315	8.1
Forest products (f.o.b. mill)	4,088	8.7	1,761	3.1	25	0.1
Mineral products	68	0.1	9,811	17.5	5,379	18.8
Stone, sand, gravel	144	0.3	5,344	9.6	84	0.3
Agricultural products (wholesale)	360	0.8	1,840	3.3	39	0.1
All natural resources products	46,944	100.0	55,934	100.0	28,647	100.0

[1] Rogers, ALASKA IN TRANSITION (1960) p. 59.
[2] Minimum food value of game taken by resident hunters, and expenditures by nonresident sportsmen.

APPENDIX 3

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
Washington

April 6, 1960.

[25 CFR Part 88]

INDIAN FISHING REGULATIONS IN ALASKA

Notice is hereby given that pursuant to the obligation imposed upon, and the authority vested in, the Secretary of the Interior by Section 2 and 9 of Title 25, and Section 485 of Title 5, U.S. Code, and Section 4 of the Act of July 7, 1958, 72 Stat. 339 amended, 73 Stat. 141, it is proposed to amend 25 CFR by adding a new part 88 as set forth below. The purpose of these amendments is to protect certain fishing rights which have long been recognized; which derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq., other Federal statutes, regulations and custom; and which were secured to the Alaska Eskimos, Indians and Aleuts by Section 4 of the Alaska Statehood Act of July 7, 1958.

It is the policy of the Department of the Interior whenever practicable, to afford the public an opportunity to participate in the rule making process. Accordingly, interested persons may submit written comments, suggestions or objections with respect to the proposed amendments, to the Commissioner, Bureau of Indian Affairs, Washington 25, D. C., within 30 days after the date of publication of this notice in the Federal Register.

Part 88, reading as follows, is added to 25 CFR, Subchapter H:

§ 88.1 *Scope.* These regulations implement section 4 of the Act of July 7, 1958, 72 Stat. 339, as amended, by declaring existing fishing rights of Indians in Alaska and providing for the protection and control thereof. Provisions for those rights derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq., and the limitations and sanctions necessary to preserve such rights are included herein. These regulations are permissive, but shall not be construed as a limitation upon any native rights not mentioned in this part.

§88.2 *Restrictions on Native Indian Traps.*

(a) Not more than the 21 salmon fish-trap sites heretofore recognized as Indian salmon fish-trap locations as hereinafter described may be utilized for the purpose of salmon trap fishing by Indian villages, within the following described waters at the sites described. Subject to the limitations of paragraph (e) of this section, traps owned and operated by the native villages may be operated at any time within a described area when salmon net fishing is permitted in any part of such area, or adjacent districts, by the State of Alaska:

Angoon Community Association.

(b) Within all waters in Chatham Strait between a true eastward line from South Passage Point and a true westward line from Point Gardner to Baranof Island; and the waters of Peril Strait north and east of Sergius Narrows, including Hoonah Sound, at the following sites:

(1) Chichagof Island at 57° 36′ 16″ north latitude, 134° 51′ 34″ west longitude.

(2) Admiralty Island at 57° 22′ 28″ north latitude, 134° 34′ 18″ west longitude.

(3) Killisnoo Island at 57° 28′ 15″ north latitude, 134° 36′ 35″ west longitude.

(4) Admiralty Island at 57° 13′ 52″ north latitude, 134° 39′ 05″ west longitude.

Organized Village of Kake

(c) All waters, except (1) those within a line from Point Bishop to 58° 11′ 28″ north latitude, 134° 5′ west longitude, (2) northeast of a line from Point Styleman to Point Anmer, and (3) waters south of a line from Point Ellis to Patterson Point; within a line following the latitude of Cape Decision easterly to Cape Decision, thence following the watershed on Kuiu Island to 56° 40′ north latitude, 133° 44′ 15″ west longitude, thence east across Keku Strait, thence across Kupreanof Island, passing north of Duncan Canal, to 56° 54′ north latitude, thence to Horn Cliffs, thence to Castle Mountain, thence following the international boundary to Mount Ogilvie, thence to the northern extremity of Shelter Island, thence to the northern extremity of Mansfield Peninsula, thence following the water-

sheds on Mansfield Peninsula and Admiralty Island to the southern extremity of Point Gardner, thence west to the watershed on Baranof Island, thence following the watershed to Cape Ommaney, thence the latitude of Cape Ommaney projected westward.

(1) Stephens Passage at 57° 21′ 20″ north latitude, 133° 27′ 02″ west longitude.
(2) Frederick Sound at 57° 11′ 27″ north latitude, 133° 34′ 02″ west longitude.
(3) Frederick Sound at 57° 10′ 52″ north latitude, 133° 32′ 44″ west longitude.
(4) Admiralty Island at 57° 18′ 40″ north latitude, 133° 57′ 21″ west longitude.
(5) Admiralty Island at 57° 10′ 29″ north latitude, 134° 12′ 53″ west longitude.
(6) Herring Bay at 57° 07′ 21″ north latitude, 134° 19′ 45″ west longitude.
(7) Admiralty Island at 57° 04′ 02″ north latitude, 134° 25′ 20″ west longitude.
(8) Kupreanof Island at 57° 01′ 23″ north latitude, 134° 02′ 50″ west longitude.
(9) Kuiu Island at 56° 55′ 52″ north latitude, 134° 16′ 08″ west longitude.

Metlakatla Indian Community

(Annette Island Fishery Reserve)

(d) All waters within a line from the international boundary at 131° west longitude to Mary Island light, Hog Rocks light, Bold Island light, Race Point, thence to the southern extremity of Vallenar Point, thence to Point Higgins, thence to Casmano Point, thence down the middle of Clarence Strait to the International boundary:

(1) Annette Island at 55° 15′ 09″ north latitude, 131° 36′ 10″ west longitude.
(2) Annette Island at 55° 12′ 52″ north latitude, 131° 36′ 10″ west longitude.
(3) Annette Island at 55° 02′ 47″ north latitude, 131° 38′ 53″ west longitude.
(4) Annette Island at 55° 05′ 41″ north latitude, 131° 36′ 39″ west longitude.
(5) Annette Island at 55° 01′ 54″ north latitude, 131° 38′ 36″ west longitude.

(6) Annette Island at 55° 00′ 45″ north latitude, 131° 38′ 30″ west longitude.

(7) Annette Island at 54° 59′ 41″ north latitude, 131° 36′ 48″ west longitude.

(8) Ham Island at 55° 10′ 13″ north latitude, 131° 19′ 31″ west longitude.

(e) During the 1960 fishing season and until the Secretary or his authorized representative determines otherwise, the villages may operate traps only at the following sites: Angoon: (1) (2) and (4); Kake: (3) (4) (8) and (9); Metlakatla: (2) (3) (4) and (6).

§ 88.3 *Size and operation of Indian salmon traps.*

(a) No trap shall extend more than 900 feet from shore to the outer face of the pot as measured at mean high tide when any part is in a greater depth of water than 100 feet.

(b) Poles shall be permanently secured to the webbing at each side of the mouth of the pot tunnel and shall extend from the tunnel floor to a height of at least 4 feet above the water. A draw line shall be reeved through the lower end of both poles and the top of one. During any period when commercial net fishing for salmon is prohibited by the State of Alaska in the waters open to trap fishing as above described, the tunnel walls shall be overlapped as far as possible, the line pulled tight and both secured so as to close the trap to fishing. In addition 25 feet of the webbing of the heart on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fish.

§ 88.4 *Definition, Karluk Indian reservation.*

The Karluk Indian reservation includes all waters extending 3,000 feet from the shore at mean low tide on Kodiak Island beginning at the end of a point of land on the shore of Shelikof Strait about 1¼ miles east of Rocky Point and in approximate latitude 57 degrees 39′ 40″ N., longitude 154° 12′ 20″ W.; thence south approximately 8 miles to latitude 57° 32′ 30″ N.; thence west approximately 12½ miles to the confluence of the north shore of Sturgeon River with the east shore of Shelikof Strait; thence northeasterly following the easterly shore of Shelikof Strait to the place of beginning, containing approximately 35,200 acres.

§ 88.5 *Fishing restrictions, Karluk Indian reservation.*

(a) Commercial fishing in the waters of the Karluk Indian reservation shall be limited to the bona fide native inhabitants of the village of Karluk and vicinity.

(b) Seasonal and gear restrictions. Commercial fishing in waters of the Karluk Indian reservation shall be limited to the time, means, methods, and extent of fishing authorized by the State of Alaska in an area bounded by a line from Cape Karluk northeasterly to midstream, thence up the middle of Shelikof Strait to 58° 26′ 30″ north latitude, thence southeasterly to Cape Paramanof, thence to Raspberry Strait light, thence to Malina Point light, thence to West Point, thence to Chief Point, thence to the southern point at the entrance to Larsen Bay at 57° 32′ N. latitude, thence to Karluk Lake and back to point of beginning at Cape Karluk; *provided* that no license shall be required of the native inhabitants of the village of Karluk, Alaska, when engaged in commercial fishing in the waters of the Karluk Indian reservation.

§ 88.6 *Commercial salmon fishing by native Indians in the Yukon and Kuskokwim Rivers.*

Certain fishing rights in the Yukon and Kuskokwim Rivers granted by Federal law and running to the native Indians of Alaska are preserved in the Statehood Act. Since the State of Alaska by Part 103 of the Regulation of the Alaska Board of Fish and Game for Commercial Fishing in Alaska (1960 Edition) has recognized these rights, no additional provision therefore is made at this time in these regulations.

§ 88.7 *Personal use fishing by native Indians.*

In all waters of Alaska Indians, Eskimos and Aleuts shall be permitted to take salmon or other species of fish for personal use except in those waters where the State of Alaska has determined that a completed prohibition on all fishing is necessary to prevent the destruction of existing salmon or other fish populations.

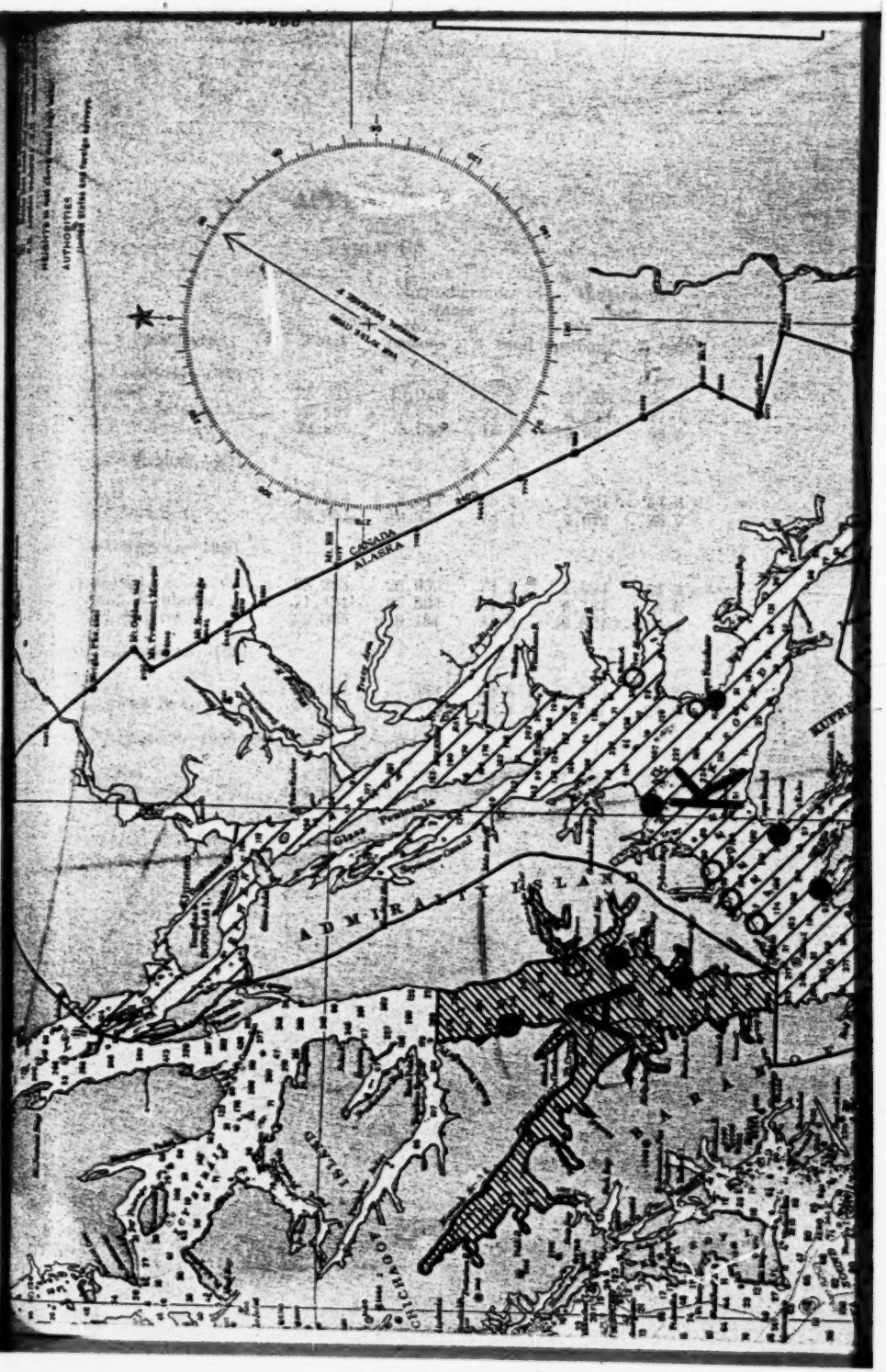
§ 88.8 *Modification of regulations.*

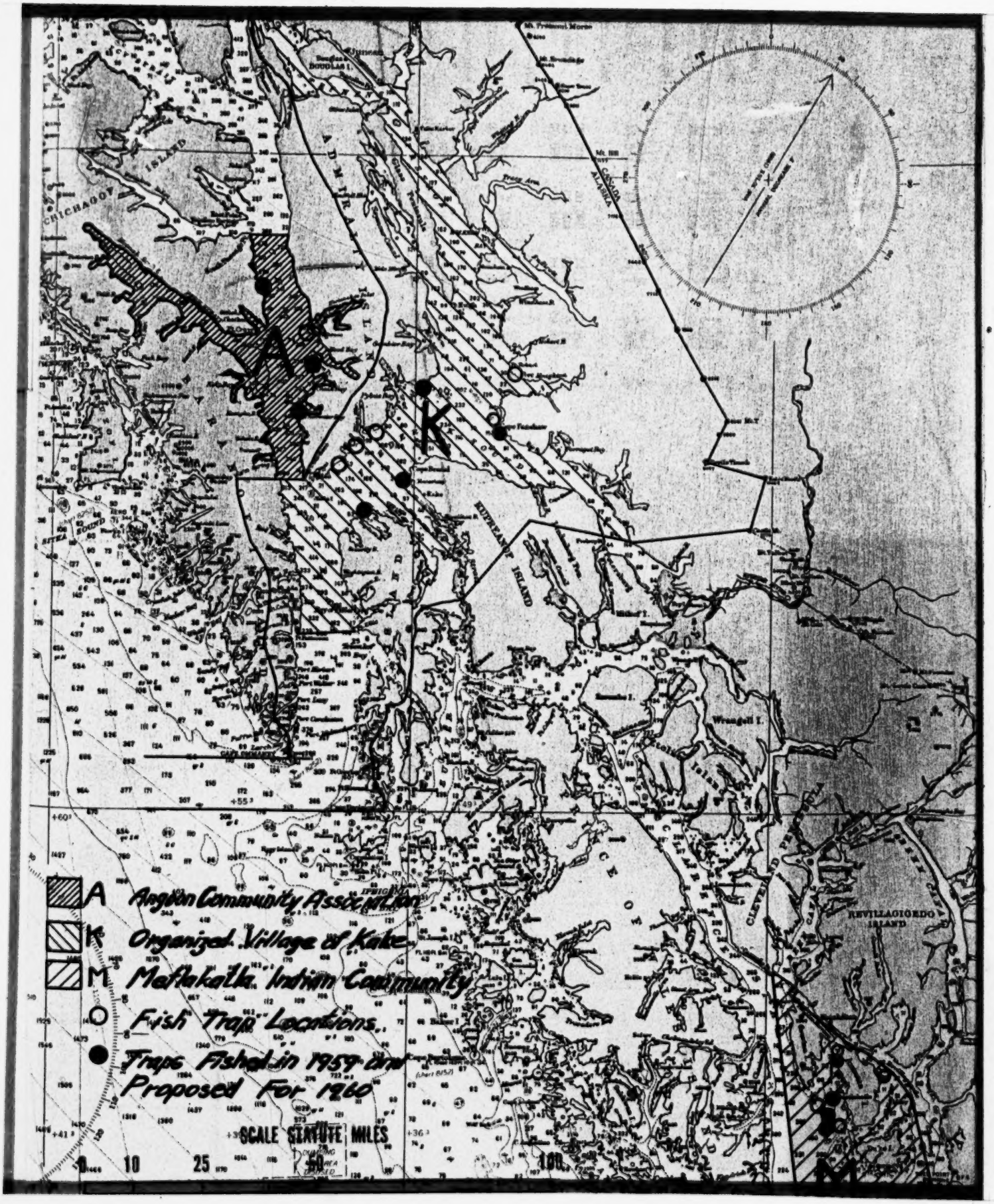
The regulations in this part will be modified from time to time as the Secretary of the Interior may deem necessary. The native Indians and Indian villages of Alaska shall be governed by these regulations in the waters where they apply or by the regulations of the State of Alaska, whichever are least restrictive to their fishing operations.

§ 88.9 *Enforcement.* Fishing activities in violation of these regulations will be subject to the sanctions imposed by the Act of June 6, 1924, as amended, 48 U.S.C. 226.

(Original signed FRED A. SEATON,)
Secretary of the Interior.

(Here follows 1 map, Appendix 4)




A Angoon Community Association
K Organized Village of Kake
M Metlakatla Indian Community
Fish Trap Locations
Traps Fished in 1959 and Proposed For 1960
SCALE STATUTE MILES
0 10 25 50 100
CHICHAGOF ISLAND
ADMIRALTY
KUIU ISLAND
KUPREANOF ISLAND
Wrangell I.
REVILLAGIGEDO ISLAND
CLEVELAND PENINSULA

APPENDIX 5

TABLE 6[1]

Region & census year	Total	Nonindigenous races No. persons	Nonindigenous races % total	Indigenous races No. persons	Indigenous races % total
Alaskan Regions—1939					
Southeast	25,241	19,062	75.5	6,179	24.5
Central & Interior	23,427	17,079	72.9	6,348	27.1
North & West	23,856	3,925	16.5	19,931	83.5
Canadian Regions—1941					
Yukon	4,914	3,213	65.4	1,701	34.6
Northwest B. C.	18,051	13,379	74.1	4,672	25.9
Alaskan Regions—1950					
Southeast	28,203	20,909	74.1	7,294	25.9
Central & Interior	71,434	65,304	91.4	6,131	8.6
North & West	29,005	9,181	31.6	19,824	68.4
Canadian Regions—1951					
Yukon	9,096	7,533	82.8	1,563	17.2
Northwest B. C.	20,854	15,807	75.8	5,047	24.2
Alaskan Regions—1956 (est.)					
Southeast	34,600	27,100	78.3	7,500	21.7
Central & Interior	138,110	131,610	95.3	6,500	4.7
North & West	33,290	13,290	39.9	20,000	60.1

[1] *Rogers*, ALASKA IN TRANSITION (1960) p. 55.

APPENDIX 6

Authorization for Fish Traps

of

Annette Island Fishery Reserve, Kake, and Angoon

abstracted [by Appellee] from

"Laws and Regulations for Protection of the Commercial Fisheries of Alaska," 1945 to 1959

published by the

U. S. Department of Interior, Fish and Widlife Service

• • • • • • • •

REGULATIONS PERTAINING TO THE *METLAKATLA* AREA

Annette Island

Year	Part & Section	Title of Section
1959	115.26	Sites open to native Indian traps. Salmon traps owned and operated by native Indian communities may be operated in 1959 at the following sites: (a) Annette Island Fishery Reserve: (1) Annette No. 3, located at 55° 02′ 47″ N. lat., 131° 38′ 53″ W. long.; (2) Annette No. 4, located at 55° 05′ 41″ N. lat., 131° 36′ 39″ W. long.; (3) Annette No. 6, located at 55° 00′ 45″ N. lat., 131° 38′ 30″ W. long.; (4) Annette No. 8, located at 55° 10′ 13″ N. lat., 131° 19′ 31″ W. long.
1958	115.27	Areas open to traps. The use of any trap for the capture of salmon is prohibited, except as follows: (f) Clarence Strait destrict (there follows a list and description of 44 areas open to traps)

(The same method of defining areas in which traps are permitted, with year, citation of regulation, and number of traps follows):

Year	Part & Section	Number of Traps Permitted
1957	122.8	28
1956	122.8	27
1955	122.8	24
1954	122.8	23
1953	122.8	39
1952	122.8	39
1951	122.8	39

Year	Part & Section	Number of Traps Permitted
1950	122.8	38
1949	122.8	38
1948	227.15	39
1947	227.15	39
1946	227.15	33
1945	227.15	33

REGULATIONS PERTAINING TO AREA IN WHICH *KAKE* TRAPS ARE LOCATED

1959 115.26 Sites open to native Indian traps. Salmon traps owned and operated by native Indian communities may be operated in 1959 at the following sites:

(b) Organize Village of Kake:

(1) Kake—Cape Fanshaw, located at 57° 10′ 52″ N. lat., 133° 32′ 44″ W. long.

(2) Kake—Point Pybus, located at 57° 18′ 40″ N. lat., 133° 57′ 21″ W. long.

(3) Kake—Point Macartney, located at 57° 01′ 23″ N. lat., 134° 02′ 50″ W. long.

(4) Kake—Cornwallis, located at 56° 55′ 52″ N. lat., 134° 16′ 08″ W. long.

1958 115.27 Areas open to traps. The use of any trap for the capture of salmon is prohibited, except as follows: (c) Eastern district: (there follows a list of 11 areas open to traps).

(The same method of defining areas in which traps are permitted, with year, citation of regulation, and number of traps follows):

Year	Part & Section	Number of Traps Permitted
1957	119.9	9
1956	119.9	8
1955	119.9	6
1954	119.9	9
1953	119.9	11
1952	119.9	11
1951	119.9	7
1950	119.9	7
1949	119.9	13
1948	224.16	11
1947	224.16	11
1946	224.16	11
1945	224.16	11

REGULATIONS PERTAINING TO AREA IN WHICH *ANGOON* TRAPS ARE LOCATED.

1959 115.26 Sites open to native Indian traps. Salmon traps owned and operated by native Indian communities may be operated in 1959 at the following sites:

(c) Angoon Community Association:

(1) Angoon—Basket Bay, located at 57° 36′ 16″ N. lat., 134° 51′ 34″ W. long.

(2) Angoon—Eagle Island, located at 57° 22′ 28″ N. lat., 134° 34′ 18″ W. long.

(3) Angoon—Point Caution, located at 57° 13′ 52″ N. lat., 134° 39′ 05″ W. long.

1958 115.27 Areas open to traps. The use of any trap for the capture of salmon is prohibited as follows:
(b) Western district: (there follows a list and description of 13 areas open to traps).

(The same method of defining areas in which traps are permitted, with year, citation of regulation, and number of traps follows):

Year	Part & Section	Number of Traps Permitted
1957	118.16	7
1956	118.16	9
1955	118.16	7
1954	118.16	7
1953	118.16	13
1952	118.16	13
1951	118.16	13
1950	118.16	13
1949	118.16	13
1948	223.19	13
1947	223.19	13
1946	223.19	13
1945	223.19	13

(Here follows 1 Paster, Appendix 7)

APPENDIX 7

[prepared by Appellee]

INFORMATION FROM ANNUAL REPORTS, UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE—(Fishery Management Reports for Districts involved) SHOWING TRAP SITES FISHED AND YEARS, 1945 TO PRESENT, INCLUSIVE.

Sites reserved for native Indian traps: None.

				Years Operated														
(a) Annette Island Fishery Reserve*				60****	59	58	57	56	55	54	53	52	51	50	49	48	47	46	45
1. Annette No. 3 (302)	location	44° 02′ 47″ N. lat.	131° 38′ 53″ W. long	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
2. Annette No. 4 (301)	"	55° 05′ 41″ " "	131° 36′ 39″ " "	X	X	X		X	X	X	X	X	X	X	X	X	X	X	X
3. Annette No. 6 (304)	"	55° 00′ 45″ " "	131° 38′ 30″ " "	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
4. Annette No. 8 (344)	"	55° 10′ 13″ " "	131° 19′ 31″ " "	X	X	X	X				X	X	X	X	X		X	X	X
5. Annette Is. (2)(299)	"	55° 15′ 09″ " "	131° 36′ 10″ " "								X	X	X	X	X	X	X	X	X
6. Annette Is. (300)	"	55° 12′ 52″ " "	131° 36′ 10″ " "					X		X	X	X	X	X	X	X	X	X	X
7. Annette Is. (303)	"	55° 01′ 54″ " "	131° 38′ 36″ " "								X	X	X	X	X	X	X	X	X
8. Annette Is. (305)	"	54° 59′ 41″ " "	131° 36′ 48″ " "								X	X	X	X	X	X	X	X	X
(b) Organized Village of Kake**																			
1. Cape Fanshaw (214)	"	57° 10′ 52″ N. lat.	133° 32′ 44″ W. long	X	X	X	X	X	X	X	X	X	X				X	X	X
2. Point Pybus (216)	"	57° 18′ 40″ " "	133° 57′ 21″ " "	X	X	X					X	X	X	X		X	X	X	X
3. Point Macartney (229)	"	57° 01′ 23″ " "	134° 02′ 50″ " "	X	X	X	X		X		X	X	X	X	X	X	X	X	X
4. Cornwallis (232)	"	56° 55′ 52″ " "	134° 16′ 08″ " "	X	X	X		X		X	X	X	X	X	X	X	X	X	X
5. Stephens Passage (Pt. Hobart) (210)	"	47° 21′ 20″ " "	133° 27′ 02″ " "								X	X	X				X	X	X
6. Frederic Sound (Deepwater Pt.) (221)	"	57° 11′ 27″ " "	133° 34′ 02″ " "								X	X	X	X		X	X	X	X
7. Admiralty Is. (226) (Pt. Brightman)	"	57° 10′ 29″ " "	134° 12′ 53″ " "				X	X	X	X	X	X	X	X	X	X	X	X	X
8. Herring Bay (223)	"	57° 07′ 21″ " "	134° 19′ 45″ " "											X			X	X	X
9. Admiralty Is. (213) (Cande Pt.)	"	57° 04′ 02″ " "	134° 25′ 20″ " "														X	X	X
(c) Angoon Community Association***																			
1. (177) Chichagof Is. Basket Bay (3)	"	57° 36′ 16″ " "	134° 51′ 34″ " "	X	X	X					X	X	X	X		X	X	X	X
2. (202) Admiralty Is. Eagle Is. (2)	"	57° 22′ 82″ " "	134° 34′ 18″ " "	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
3. Killisnoo Is. (9) (203)	"	57° 28′ 15″ " "	134° 36′ 35″ " "								X	X	X	X	X	X	X	X	X
4. (206) Admiralty Is. Point Caution (1)	"	57° 13′ 52″ " "	134° 39′ 05″ " "	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X

* Operated by Meltakatla beginning with 1950 per this Appendix.

** operated by Kake since 1950, inclusive.

*** operated by Angoon since 1948, inclusive.

**** from proposed regulations published 25 Fed. Reg. 3079, April 9, 1960.

APPENDIX 8

CERTIFICATE

I, HUGH J. WADE, certify that I have been elected and am the duly qualified Secretary of State for the State of Alaska; that as Secretary of State I have custody of the records of the proceedings of the Constitutional Convention of 1955, 1956 for the State of Alaska; that I have examined the attached portion of the record of the proceedings of that convention; that I have compared it with the original record of said proceedings in my custody and find that the attached portion of said record is a true and correct copy of the cited portion of the original record.

Given under my hand and the Seal of the State of Alaska, in the City of Juneau, this 26th day of June, 1959.

HUGH J. WADE,
Secretary of State of the State of Alaska.

PROCEEDINGS OF CONSTITUTIONAL CONVENTION, 64TH DAY, JAN. 25, 1956

President EGAN: The Convention will come to order. Mr. Stewart changes his vote to yes.

The result of the roll call was then announced.

President EGAN: And so the Yeas have it and the proposed amendment is ordered adopted.

Delegate MCNEES: Inasmuch as we have transacted some business, I again move that we recess until ten minutes after four.

President EGAN: Mr. McNees moves and asks unanimous consent that the Convention stand at recess until ten minutes after four. Is there objection? Hearing no objection it is so ordered.

The Convention was then at its regular afternoon recess.

President EGAN: The Convention will come to order. We have before us Committee Proposal No. 16. Are there other amendments to Committee Proposal No. 16?

Delegate VICTOR FISCHER: Point of order.

President EGAN: Your point of order, Mr. Fischer.

Delegate VICTOR FISCHER: According to the calendar the next business is Style and Drafting reports.

President EGAN: Well, Mr. Fischer, that is correct. But it is the recollection of the Chair that we were on a unified Committee Proposal No. 16. Then Mr. White made his proposal or served notice of reconsideration and that brought Committee Proposal No. 16 back before us in its original position. If there are no other amendments we could have it on its way to Engrossment and Enrollment quickly; that is the only feeling the Chair had on it.

Delegate VICTOR FISCHER: I don't want to delay this matter but I have a question on this Section.

President EGAN: Well it would be before us in reconsideration in its original status as it came before the body.

Delegate VICTOR FISCHER: May I address it to the Chairman of the Ordinance Committee?

President EGAN: There is no objection, Mr. Fischer.

Delegate VICTOR FISCHER: The section deals with a disclaimer to the property held by the United States and the property claimed or owned by the natives of Alaska. The language followed is that in House Bill 2535. Has the Committee taken into consideration the fact that the Senate in its Enabling Bills has ordered a different section covering this matter and there has been very strong disagreement between the two houses, the Senate not being willing to yield to the House version.

President EGAN: Mr. McNealy, could you answer that question.

Delegate MCNEALY: Mr. President, the Committee had considered that particular point and our thought and purpose of continuing the language of the House Bill was due to the fact that the House Bill is still in the House of Representatives as it is. This particular House Bill wasn't defeated; it was sent back to Committee and our only thought on that point was that since it was back to Committee and there was even a possibility of that same bill coming out or the same bill being reintroduced at the next session of Congress or, if by any long chance, that bill can be reported out of Committee again this year, then it would be in the exact language as the House Bill which in effect isn't completely dead, although it is pretty well buried in Committee. As it was impossible for us to set up two alternatives, we more or less figured the lesser of two evils.

Delegate VICTOR FISCHER: I was wondering whether Sec-

tion 2 might not possibly—Mr. Smith's amendment which we adopted as Section 2—might not possibly cover the reservations of rights to

Constitutional Convention Committee Proposal 16

January 19, 1956.

Constitutional Convention of Alaska

COMMITTEE PROPOSAL NO. 16

Introduced by Committee on Ordinances and Transitional Measures

GENERAL AND MISCELLANEOUS PROVISIONS

RESOLVED, that the following be agreed upon as part of the Alaska State Constitution.

Disclaimer Regarding Native Lands

Section 1. The state of Alaska and its people do agree that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of the Act of Admission of this state, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights) the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe and except when held by individual natives in fee without restrictions on alienation; and that no taxes shall be imposed by the State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without

restriction on alienation; and no legislative act by the State of Alaska shall be taken thereon. Nothing in this section shall prevent this state from accepting any payments in lieu of taxes that may be authorized by the Congress. The foregoing ordinance shall be irrevocable without the consent of the United States and the people of this State.

Consent to Enabling Act

Section 2. The State of Alaska and its people hereby consent to all and singular the provisions of the Enabling Act that is passed by Congress and approved by the President for the admission of Alaska into the Union of States.

University of Alaska

Section 3. The University of Alaska is hereby established as the state university and constituted a body corporate to continue uninterrupted in all repects as provided by law.

APPENDIX 9

IN THE DISTRICT COURT FOR THE TERRITORY OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

No. 6688-A.

In the Matter of the incorporation of the CITY OF KAKE as a First Class Municipal Corporation

ORDER OF INCORPORATION

At this time the Court considers the records and files herein, from which it appears and the Court finds that heretofore a petition was duly filed in this Court and cause executed by more than one hundred bona fide residents and inhabitants of the community of Kake of the First Division of the Territory of Alaska, praying that said community become incorporated as a first class city under the laws of the Territory of Alaska.

That upon consideration of the said petition this Court made its Order of August 23, 1952, directing that a hearing be had upon the said petition before the Court; that three copies of the said Order were duly posted and remained posted in three most conspicuous places within the boundaries of the territory to be incorporated as aforesaid.

That a hearing was had upon the said petition on September 23, 1952 before the Court and no one appeared in opposition thereto; that upon such hearing this Court made its certain Order of September 23, 1952, finding that it is for the best interests of the said community and its inhabitants that it become incorporated as a city of the first class.

That in said Order of September 23, 1952 the Court did designate the name of the said proposed corporation and did fix the territorial boundaries and limits to be embraced therein, reforming the same as appears by plat attached to said Order of September 23, 1952, and further did fix the time and place for the holding of an election to determine whether a majority of the qualified residents and inhabitants of said community desire to become incorporated as a city of the first class and did appoint three qualified and competent persons as judges of the said election.

That copies of the said Order of Election were duly

posted and remained posted as required by law in the three most conspicuous public places within the limits of the territory to be embraced in and so incorporated.

That pursuant to said Order an election was duly held on the 31st day of October, 1952, and the said election judges, theretofore duly qualifying themselves, have returned into this Court their return and certificate from which it appears and the Court finds that 128 votes were cast for and 7 votes were cast against said incorporation of said community as a city of the first class.

That at said election, and by a separate ballot the said electors cast their ballots for the election of six councilmen and a mayor and five school directors of the said corporation; that it appears from the said return and certificate that the following named persons received the highest number of votes for the offices set opposite their respective names, to-wit:

John Bean	Mayor
Andrew Gamble	Councilman
Daniel Paul	Councilman
Raymond Bell	Councilman
Walter Williams Sr.	Councilman
Mitchell Martin	Councilman
Frank Gordon	Councilman
Morris Grant	School Director
Thomas L. Jackson	School Director
Willie Duguqua	School Director
Mrs. Helen Skeak	School Director
James Thomas	School Director

That all matters and things required to be done and observed in the premises have been done and performed in conformity with the laws of the Territory of Alaska and the Orders of the Court.

And now, the Court being advised and having found as aforesaid:

IT IS ORDERED, ADJUDGED AND DECREED that the community, commonly known as KAKE, situate and existing in the First Judicial Division of the Territory of Alaska, be and hereby is incorporated as a municipality of the first class, pursuant to and under the laws of this Territory, and shall enjoy and possess all the rights, powers and privileges granted by law unto cities of the first class; that the boundaries

of said community thus incorporated be and hereby are as follows:

Commencing at Corner No. 1, which is identical with Corner No. 1 of U.S. Survey (Alaska) No. 1871, and from which United States Land Monument No. 1871 bears South 28 degrees 17 minutes East a distance of 879.70 feet;

Thence North 57 degrees 16 minutes East a distance of 1164.14 feet to Corner No. 2;

Thence South 43 degrees 10 minutes East a distance of 4678.56 feet to Corner No. 3;

Thence South 45 degrees 17 minutes East a distance of 4092.51 feet to Corner No. 4;

Thence South 38 degrees 00 minutes West a distance of 2371.66 feet to Corner No. 5;

Thence North 51 degrees 46 minutes West a distance of 2420.56 feet to Corner No. 6;

Thence North 42 degrees 11 minutes West a distance of 3712.13 feet to Corner No. 7;

Thence North 62 degrees 49 minutes West a distance of 2479.23 feet to Corner No. 8;

Thence North 7 degrees 34 minutes West a distance of 1905.81 feet to Corner No. 9;

Thence North 77 degrees 57 minutes East a distance of 1250.00 feet to Corner No. 1, the point of beginning;

all of which appears on the plat thereof attached hereto; and it is further—

ORDERED, ADJUDGED AND DECREED that the aforesaid persons elected to the offices respectively set opposite each name be and hereby are declared duly elected to such offices of the City of Kake, and upon taking the oath of offices as required by law are entitled to hold such offices and perform the duties and functions thereof from this date for the term of each respective office provided by law.

Done at Ketchikan, Alaska, this November 7th, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

Presented by:

WILLIAM L. PAUL JR.,
Petitioners' Attorney.

[Map omitted in printing.]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 326

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation,
Appellant,

vs.

WILLIAM A. EGAN, Governor of the State of Alaska,
and
THE STATE OF ALASKA, *Appellees.*

On Appeal from the District Court for the State of Alaska

REPLY BRIEF FOR APPELLANT

Most of the contentions made in appellees' brief have been anticipated and, we believe, fully answered in Appellant Metlakatla's Main Brief. Only two arguments now advanced are truly novel. One of them relates to the alleged invalidity of the Metlakatla Fishery Reserve on the ground of vagueness, the other to the alleged unconstitutionality of Section 4 of the Alaska Statehood Act on the ground that the Metlakatla Indian Community is not an Indian Tribe.

I. The Boundaries of the Metlakatla Fishery Reserve Are Clearly Defined.

Appellees concede that Appellant Metlakatla was granted a reservation by statute in 1891 and that the reservation was defined by Presidential Proclamation in 1916 to include "waters within three thousand feet from the shoreline at mean low tide." Appellees' Br., p. 43. However, great emphasis is placed by appellees on the fact that when this Court, in 1918, had the issue before it, it relied on the statutory grant of 1891, which the Court defined as including the Annette Islands and "surrounding waters," but failed to mention the Presidential Proclamation. *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918). Appellees argue that, since this Court did not mention the Presidential Proclamation and thus "declined to dignify it," we must now disregard the Proclamation. It follows, appellees further contend, that the Reserve as defined by this Court is too indefinite to establish a clear line of demarcation between Federal and State jurisdiction and that the Reserve must, therefore, have fallen with the advent of Statehood.

It might appropriately be asked how it could follow that the boundary of the Fishery Reserve was definite enough to permit issuance of an injunction against private trespassers in the *Alaska Pacific Fisheries* case, *supra*, but is at the same time so indefinite as to prevent the issuance of an injunction against the State's efforts to interfere with the operation of the Reserve. But this question need not be answered. The fact of the matter is that since this Court considered the problems in 1918, the Presidential Proclamation of 1916 has been expressly ratified by Congress. Section 3 of the Act of May 7, 1934, 48 Stat. 667, provides:

(b) The Indians of the Tsimshian Tribe, and those people known as Metlakahtlans, who emigrated from Metlakahtla, British Columbia, Canada, to Annette Island, in the Alexander Archipelago in southeastern Alaska in the year 1887, and there established a colony known as Metlakahtla, Alaska, and any and all other British Columbia Indians who joined them there not later than January 1, 1900, and have since resided continuously therein, having been faithful and loyal to the Constitution, laws and the Government of the United States, are hereby declared to be citizens of the United States.

(c) The granting of citizenship to the Indians described in section 3(b) of this title shall not in any manner affect the rights, individual or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise, and administer the affairs of the said Metlakahtla Colony. And *any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect* and shall continue to be subject to modification, alteration, or repeal by the Congress or the President, respectively. (Emphasis supplied.)

II. The Metlakatla Indian Community Is an Indian Tribe

Appellees' assertion that the power of Congress under the Indian Commerce Clause extends only to Tribal Indians, Appellees' Br., p. 45, correctly states a basic proposition of Indian law. See COHEN, HANDBOOK OF FEDERAL INDIAN LAW 177-8 (1945) (1958 Rev. at 573-5). Appellees deviate from the path of established law, however, when they contend that Appellant Metlakatla is not an Indian Tribe and that the Federal Government has no authority to deal with it. This is indeed a revolutionary doctrine which, if accepted by

this Court as applying to Alaska Natives, would require the immediate cessation of all special Federal assistance programs to these Natives, most of which programs are in the field of public health. Such a doctrine would strip from the people of the State of Alaska far more than certain fishing interests would gain from the elimination of three competitors.[1]

The fact of the matter is that Metlakatla is, as it is designated in the caption of this appeal and was designated in the complaint, an "Indian community." It has been recognized as such by the Federal Government since prior to 1891 and is recognized as such to this day. Its local government operates under a Constitution approved by the U. S. Department of the Interior on August 23, 1944 under Section 16 of the Indian Reorganization Act, as amended, 25 U.S.C. § 476. Its business ventures are carried out under the terms of a Federal charter approved on the same date under Section 17 of the Indian Reorganization Act, as amended, 25 U.S.C. § 477. Appellees evidently suggest that both of these documents are void, that the Department of the Interior erred in recognizing Metlakatla as an Indian Community.

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[1] As long ago as 1936 Senator Gruening, then Director of the Division of Territories and Island Possessions of the Department of the Interior, observed:

> The extension of the economic and social benefits of the Indian reorganization act to Alaska has paved the way for the security of approximately one-half of the present population of the Territory, whose stabilized future is not only an essential act of humanitarianism but also an important item of wholesome advance.

Annual Report of the Secretary of the Interior (1936) at 30.

The law applicable to this problem is authoritatively stated in COHEN,[2] *op. cit. supra,* at 268, as follows:

> The question of tribal existence, in the legal or political sense, has generally arisen in determining whether some legislative, administrative, or judicial power with respect to Indian "tribes" extended to a particular group of Indians.
>
> * * *
>
> While . . . making the validity of congressional and administrative actions depend upon the existence of tribes, the courts have said that it is up to Congress and the executive to determine whether a tribe exists. Thus the "political arm of the Government" would seem to be in a position to determine the extent of its power. In this respect the question of tribal existence and congressional power has been classed as a "political question" along with the recognition of foreign governments and other issues of international relations.

As Justice Van Devanter observed in *United States* v. *Sandoval,* 231 U.S. 28, 46 (1913):

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions of whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.

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[2] The late Felix S. Cohen has been characterized by this Court as "an acknowledged expert in Indian Law." *Squire* v. *Capoeman,* 351 U.S. 1, 8 (1956).

The procedure followed by the Executive in deciding on the existence of tribes has been explained by COHEN, *op. cit. supra,* at 270-71, as follows:

> The question of what groups constitute tribes or bands has been extensively considered in recent years by the administrative authorities of the Federal Government in connection with tribal organization effected pursuant to section 16 of the Act of June 18, 1934. A showing that the group seeking to organize is entitled to be considered as a tribe, within the meaning of the act, is deemed a prerequisite to the holding of a referendum on a proposed tribal constitution, and the basis for such a holding is regularly set forth in the letter from the Commissioner of Indian Affairs to the Secretary of the Interior recommending the submission of a tribal constitution to a referendum vote. In cases of special difficulty, a ruling has generally been obtained from the Solicitor for the Interior Department as to the tribal status of the group seeking to organize. The considerations which, *singly, or jointly,* have been particularly relied upon in reaching the conclusion that a group constitutes a "tribe" or "band" have been:
>
> (1) That the group has had treaty relations with the United States.
>
> (2) That the group has been denominated a tribe by act of Congress or Executive order.
>
> (3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
>
> (4) That the group has been treated as a tribe or band by other Indian tribes.

(5) That the group has exercised political authority over its members, through a tribal council or other governmental forms.

Other factors considered, though not conclusive, are the existence of special appropriation items for the group and the social solidarity of the group.

Ethnological and historical considerations, although not conclusive, are entitled to great weight in determining the question of tribal existence. (Emphasis supplied.)

Appellant Metlakatla "has been treated as having collective rights in tribal lands or funds." Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358; Presidential Proclamation No. 1332, April 28, 1916, 39 Stat. 1777; Act of May 7, 1934, 48 Stat. 667. It "has exercised political authority over its members." See COHEN, *op. cit. supra,* at 415 (1958 Rev. at 963-64). It has "social solidarity" as a group, is largely of the same ethnic stock, and has a continued history as a group. *Ibid.* The Interior Department thus clearly did not err when it approved a Constitution and Charter in 1944, continuing its recognition of Metlakatla as an Indian Tribal community. Such recognition must be deemed conclusive. See *United States* v. *Holliday,* 70 U.S. (3 Wall.) 407, 418-419 (1866); *The Kansas Indians,* 72 U.S. (5 Wall.) 737, 755-57 (1867); *Chippewa Indians* v. *United States,* 307 U.S. 1, 4-5 (1939).

III. Appellees' Other Arguments Are Similarly Without Merit

Other arguments of appellees are fully answered by the Main Brief of Appellant Metlakatla. Thus the contention that control of Indian fisheries passed to the State under Section 6(e) of the Alaska Statehood Act (Appellees' Br., p. 23), is rebutted by Appellant Met-

lakatla's analysis of Section 4 of that Act (Appellant's Br., pp. 28-39).[3] Appellees' bald assertion that Section 4 constitutes surplusage (Appellees' Br., p. 60) runs counter to the basic canon of statutory construction that "a legislature is presumed to have used no superfluous words," *Platt* v. *Union Pacific R.R.*, 99 U.S. 48, 58 (1879), and that "[i]t is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed." *Inhabitants of Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883). The contention that Section 4 of the Statehood Act is unconstitutional as violative of the "equal footing" doctrine (Appellees' Br., pp. 57-60) is shown to be unsound on pp. 39-42 of Appellant Metlakatla's Main Brief. Appellees entire discussion of the Alaska Omnibus Act (Appellees' Br., pp. 35-39) is wholly off the point as a mere examination of the Budget Bureau report, reproduced on p. 38 of Metlakatla's Brief, will demonstrate.[4]

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[3] In suggesting that the Secretary of the Interior did not rely on Section 4 of the Statehood Act until he published his proposed 1960 regulations (Appellees' Br., p. 2), appellees have apparently overlooked the fact that at least as early as March 10, 1959 the Under Secretary of the Interior announced his reliance on Section 4 as a source of continuing authority over the Metlakatlans. See Appellant Metlakatla's Main Brief, p. 27, n. 3.

[4] Appellees are under the impression that the section of the Omnibus Act relevant to this case was designed to reduce the power of the State. The Budget Bureau letter transmitting the Omnibus Act to Congress shows that the legislative intent was to expand the powers of the State with regard to Federal land, but not with regard to Indian land. See H.R. Rep. No. 369, 86th Cong., 1st Sess. 6 (1959); Hearings before the Senate Interior Committee on S. 1541, 86th Cong., 1st Sess. 64 (1959).

Throughout their brief, appellees have repeatedly alleged that 42% of Alaska's fishermen are natives and that they would be at all times beyond the State's control if this Court reverses the District Court. Lest this Court be left with a misapprehension as to appellant's position with regard to the nature and extent of its rights, we wish to set the record straight.

Appellant Metlakatla is in no position to confirm or deny the figure of 42%. Appellant most emphatically denies, however, the view attributed to it that mere racial origin exempts Alaska native fishermen from State control, irrespective of where they may fish. It is appellant's position that native fishermen are under exclusive Federal control only if they fish in a geographic area in which they have rights preserved by Section 4 of the Alaska Statehood Act. Thus, appellees' illustrative example, Senator Beltz (Appellees' Br., p. 58), would most assuredly be under State control if he attempted to fish within the Annette Island Reserve. Similarly, Metlakatlans would be under State control when they proceed beyond the boundaries of the Reserve—as they often do.

CONCLUSION

For the reasons set forth in the Briefs of Appellants, this Court should note jurisdiction and reverse the judgment below.

Respectfully submitted,

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Attorneys for Appellant

Of Counsel:
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FRANK & KAMPELMAN

Dated: May 17, 1960.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

METLAKATLA INDIAN COMMUNITY, ETC. (No. 326)
ORGANIZED VILLAGE OF KAKE, ET AL. (No. 327)

v.

EGAN, GOVERNOR OF ALASKA, ET AL.

On Appeal from the District Court for the District of Alaska

REPLY BRIEF

for Appellants in No. 327, Organized Village of Kake, et al.

Appellee says (p. 27) that Congress never recognized any Indian fishing rights, therefore none existed, therefore none were preserved by the disclaimer in § 4 of the Statehood Act. The amicus, in turn (pp. 6-11, 15-16) threads a narrow path while supporting appellants' prayer for reversal: It says "the United States has not, by treaty or agreement, established permanent homes, *i.e.*, created 'recognized Indian title'—for any of the Alaskan natives," who merely have permissive occupation and not legal rights, so that the disclaimer by Alaska means that Congress may hereafter determine the extent of the rights, if any, to be recognized in these appellants. The ultimate basis for the positions of appellee and the amicus seems to be the two

cases *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86 (1949), and *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272 (1955).

Neither case is apposite. *Hynes* held that while the Secretary of the Interior had established a valid Indian reservation in tideland waters at the Karluk Reservation (337 U. S., pp. 115-116), still the White Act was not a proper basis for the enforcement of criminal sanctions against non-Indian trespassers, pp. 116 *et seq.* *Tee-Hit-Ton* held the United States was not liable under the standing authorization to sue (accorded by § 1505 of the Judicial Code) to pay compensation for taking, pursuant to act of Congress, of the Indian title to lands held by certain Alaskan natives who, like these appellants, are members of the Tlingit group. Neither case held that non-treaty Indians do not have rights. Neither case overruled the long line of authority establishing that rights do exist, to which we now turn:

Appellants Kake and Angoon Have a Property Right In Their Fishing.—Speaking of these appellants, appellee argues (p. 25) that "It is just as impossible to return to the Indians the fishery of Alaska as it is impossible to return to them the State of Kansas, although both were exclusively theirs." But what is to be protected here is what has *not* been lost—and what has not been lost, though perhaps trifling in comparison with what they once had, is clearly a property right.

Even with unrecognized Indian title and without a reservation, these Indians have rights which they have exercised since before the first white man came to Alaska. The small remnant of these rights they seek

here to protect. The fact that they have always been fishermen is recognized not merely by appellee, but is shown by the recent case of *Tlingit and Haida Indians of Alaska* v. *United States*, — C. Cls. —, 177 F. Supp. 452, 456-457 (1959). The aboriginal range of the Kake and the Angoon clans is depicted at page 455 of 177 F. Supp. (see the very center of the map there reproduced). This Court has taken notice of similar historical facts with respect to other Alaskan Indians. *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 94-95 and note (1949).[1]

The rights are legal rights, not merely moral ones. From the outset of our national dealings with the Indians, the natives of this country have been "admitted to be the rightful occupants of the soil, with a

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[1] The basis for these appellants' rights is not limited by this record to the concessions of appellee and historical facts of which the Court will take notice. There is no issue of fact stemming from the assertion in the motions to dismiss below (¶ 2, S.R. 121, 122) that "Plaintiff has no property right in a fish trap location"; for it was based on the legal theory of appellee, accepted below, that the Statehood Act in preserving Indian rights was unconstitutional as impairing Alaska's equal footing, and that the state statutes forbidding exercise of the rights were, in turn, constitutional as applied to Indian fishing—quite apart from whether the Indians had ever had the right. Actually, each complaint to which the motions were addressed had pleaded not only tribal status (¶ I, S.R. 82-83, 102) but had also specifically pleaded (if that were necessary) the fact of Secretarial recognition of the rights of appellants in connection with the regulations promulgated for the 1959 season (¶¶ VI-VII of each complaint, S.R. 84-85, 104-105). The announcement of similar regulations proposed in April, 1960 (commencing p. 32 of our separate Appendix) are similar. If in the light of the presumption of regularity attending such official recognition some denial of the *fact* of the ownership and exercise of the fishing rights by appellants were ventured by appellee, a heavy burden of proof would appear to be cast upon appellee—quite apart from appellee's apparent concessions and the matters of plain history to which we have called attention.

legal as well as just claim to retain possession of it." *Johnson* v. *McIntosh,* 8 Wheat. 543, 574 (1823). "Whether . . . a reservation . . . or unceded Indian country, . . . the Indians' **right** of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Minnesota* v. *Hitchcock,* 185 U. S. 373, 388-9 (1902). The Court has referred to the Indians' ". . . unquestioned **right** to the lands they occupy, until . . . extinguished by a voluntary cession to our government; . . ." *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 17 (1831). Indians have **rights** of occupancy . . . as sacred as the fee-simple, absolute title of the whites; . . ." (id., p. 48). They have ". . . a **right** to all the lands within [their territorial] boundaries, which is not only acknowledged, but guaranteed by the United States." *Worcester* v. *Georgia,* 6 Pet. 515, 557 (1832). Indians hold lands ". . . **owning** them by a perpetual right of possession in the tribe . . . [which, though fee was in the crown] could not be taken without their consent . . . . their **right** of occupancy is considered as sacred as the fee-simple of the whites." *Mitchel* v. *United States,* 9 Pet. 711, 745-746 (1835). The Court has spoken of their ". . . unquestionable **right** to the lands they occupy, until . . . extinguished by a voluntary cession . . . This perpetual **right** of occupancy, with the correlative obligation of the government to enforce it . . . ." *Leavenworth Railroad* v. *United States,* 92 U. S. 733, 742 (1875). It has spoken of the ". . . **right** of Indians to their occupancy [which] is as sacred as that of the United States to the fee, . . ." *United States* v. *Cook,* 19 Wall. 591, 593 (1873). It has said that "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian **right** of occupancy . . ." *United States as Guardian, etc.* v. *Santa Fe Pacific*

Railroad Co., 314 U. S. 339, 345 (1941), and *Cramer* v. *United States*, 261 U. S. 219, 227 (1923). "It was the usual policy not to coerce the surrender of lands without consent and without compensation. . . . Something more than sovereign grace prompted the obvious regard given to original Indian title." *United States* v. *Alcea Band of Tillamooks*, 329 U. S. 40, 48 (1946).

The legal position of a tribe or (as here) a clan of Indians cannot well be understood without the realization that it constitutes a government—not merely aboriginally, but now—not with only property rights, but with governmental functions recognized by the Indian Reorganization Act (under which these appellants are organized, S.R. 82-83, 102) itself. But the fact that these are political entities, owing, when the white man first came to their country, no allegiance to the United States, has been the Achilles heel of the Indian tribes of this country.

Though their legal rights are plain beyond all cavil, they are governments; the dealings of the federal government with their legal rights is in the political field. No more than could the Russian Government on a trespass by the United States could the Indian tribes come to this country's courts for redress. The Indians could appeal only to the political branch, only to the political conscience of our country. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565-566 (1903).

And when that conscience has heeded the natives' appeal, as has so frequently been the case with the legislative branch of our government (as distinguished from the executive, whose representatives so often have sided with the pioneer in his conflicts with the aborigine), the courts are freed from the political restraint and bound to protect the native's existing rights. While the student may express wonder that the courts call a

violation of "unrecognized" title (as distinguished from land held pursuant to treaty or statute) a mere trespass as distinguished from a taking under the 5th Amendment entitling the aboriginal owner to just compensation,[2] and while the student may wonder why a treaty right may, under § 1505 of the Judicial Code (Appendix, *post*), collect just compensation immediately upon a taking, while the Indian-title right must await still further political permission from Congress,[3] the fact that in any event there is a right fur-

[2] For a *tortious* taking of private property for public use there is no right to just compensation under the Fifth Amendment. *United States* v. *Goltra*, 312 U.S. 203, 208 (1941). But a treaty title of Indians, despite the political bar to suit, gives the right (enforceable when Congress gives permission to sue) to just compensation under the Fifth Amendment. *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 115-116 (1938); 299 U.S. 476, 495-496 (1937). On the other hand, if the rights involved are aboriginal rights not politically recognized by the United States through treaty or statute—that is, which have not become a contract right of, or a guaranty by the United States to, the Indians, then a taking of title by the United States, and apparently with or without the authorization of Congress, is tortious and does not require just compensation under the Fifth Amendment, *i.e.*, results in a judgment for only the value at time of taking without any damages for delay in making payment. *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951). Note that the *Alcea* case cites the *Goltra* case (tortious taking) as authority for this distinction.

[3] A taking of recognized Indian title—the contract right referred to in note 2, just above—is one "arising under or growing out of any treaty, agreement or act of Congress." *United States* v. *Creek Nation*, 295 U.S. 103, 108 (1935); *Shoshone Tribe* v. *United States*, 299 U.S. 476, 496 (1937); *Seminole Nation* v. *United States*, 102 C. Cls. 565 (1944). Therefore it comes under the express language of § 1505 of the Judicial Code (Appendix, *post*); the taking gives a right of immediate action for just compensation. Not so with Indian title which has not been recognized; while it affords the same basis for recovery if Congress waives the political bar and permits suit (first *Alcea—United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40 (1946); cf. second *Alcea*,

nishing adequate basis for judicial recognition is left undoubted by the cases.[4] And here that political conscience has heeded the appeal. In Section 4 of the Statehood Act Congress expressly required a disclaimer by Alaska not only of all right and title to property (including fishing rights) held by or for any Indians, but also an agreement that there is retained by the United States absolute jurisdiction and control of that property (including fishing rights). No matter how or when the United States might take the remaining fishing rights of appellants, or how or when or to what extent it might make compensation for their taking, the fact remains that the fisheries is a property right of appellants, and until and unless interfered with by Congress, Alaska is powerless to terminate it.

Respectfully submitted,

JOHN W. CRAGUN,
Counsel for Appellants in No. 327.

FRANCES L. HORN,
WILKINSON, CRAGUN & BARKER,
Of Counsel.

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above, n. 2) this Court squarely held that a tribe cannot recover for its taking under the language of § 1505 of the Judicial Code. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955). While the latter decision is easy enough to understand as relating to a taking not "arising under the Constitution, laws or treaties of the United States," since no treaty guaranteed the right that was taken, still the Court's opinion is not instructive as to why the right is not a claim "which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian trible, band or group," also embraced by that section; for if, as the cases indicate, the bar to suit is the political bar, then an Indian tribe just like any other property-owning corporation might have been thought entitled to sue for its property once that bar has been removed.

[4] First and second *Alcea*, discussed in notes 2 and 3 just above.

APPENDIX

Sec. 1505 of the Judicial Code (28 U.S.C. § 1505) was derived from § 24 of the Indian Claims Commission Act (Act of August 13, 1946, 60 Stat. 1049, 1055), according the first general authority to Indian tribes to sue the United States on such of their claims as might arise after the date of that act. In its present form it was adopted with the Judicial Code of 1949, and reads:

§ 1505. Indian claims

The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

[illegible]

[illegible]

[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 2

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE, a Federally Chartered Corporation, *Appellant*

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees*

On Appeal from the Supreme Court for the State of Alaska

REPLY BRIEF FOR APPELLANT

One week prior to the second oral argument of this case in the Supreme Court of the United States, the State of Alaska has filed a brief in which it concedes on most of the arguments which it has strenuously advanced against Metlakatla throughout the long course of this litigation and in which it, in effect, repudiates the decision of its own Supreme Court.

In its brief before this Court the State has now agreed:

(1) that Congress had the power to establish the Metlakatla Reservation and that the Act of 1891 is, therefore, valid (see Alaska Br. 39);

(2) that the Reservation could and did continue to exist past the time of Alaska's admission to the Union without violating the equal footing doctrine (see Alaska Br. 39, 44);[1] and

(3) that the Metlakatla fishing right established under the 1891 Act "can reasonably be termed a 'native fishing right' within the meaning of Sec. 4 of the Statehood Act" and has thus been explicitly preserved by the Statehood Act (see Alaska Br. 39).

Having retreated so far, the State's sole remaining argument is that Metlakatla's fishing right, namely an exclusive fishing reserve, is subject to State regulation. The State's regulatory power, under this new theory, does not arise out of any Constitutional inhibition on the Federal Government to exclude State regulation, for appellees admit that "[i]t is clearly within the power of the Federal Government to create Indian reservations within a state or territory which will be free from all local regulatory authority". Alaska Br. 39. What appellees now suggest is that Congress has acted to permit such regulation. Alaska Br. 41, 45.

It is respectfully submitted that the State's new legal position is as much without merit as its old one

[1] Of the Alaska Supreme Court's holding to the contrary, appellees now say: "It is not necessary to draw such a forceful conclusion". Alaska Br. 44.

was. Significantly, appellees' brief does not cite or discuss any specific Congressional action which might tend to bolster its contentions. Instead it speaks vaguely of the "decision of the federal authorities . . . to have the fishing within the reserve regulated under a uniform system of regulation". Alaska Br. 45. Where, how and by whom this "decision" was made is not specified.

Appellees' inability to point to any specific action of Congress to support its contention that the Metlakatla fishery is now under State regulation is, of course, due to the fact that there is none. The fact is that Congress took the very opposite position. In the statutes which created and preserved Metlakatla's rights, Congress most emphatically reserved to the Federal government the power of regulation. None of these relevant provisions of law, it should be noted, are discussed in appellees' brief. Indeed, appellees have studiously avoided mention of the regulatory clauses in three crucial statutes:

(1) The Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. 358, which sets apart the Annette Islands for the Metlakatlans

> "to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

(2) The Act granting Alaska jurisdiction over crimes committed on Indian Reservations, Pub. L. 280, 83rd Cong. 67 Stat. 588, as amended, 72 Stat. 545, 18 U.S.C. 1162(a), which provides that

> "Nothing in this section shall . . . deprive any Indian . . . community of any right, privilege,

> or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.'"[2]

(3) Section 4, Alaska Statehood Act, 72 Stat. 339, which provides that native rights (including fishing rights)

> "shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority. . . ."

Rather than attempting to explain these specific reservations of Federal regulatory authority, appellees speak vaguely of an allegedly traditional Congressional policy of effecting a "uniform scheme of fisheries regulation." Alaska Br. 42. Closer scrutiny of the relevant background reveals that this "policy" is based upon nothing more than the historical accident that (1) during the period of Alaska's Territorial status responsibility for non-Indian fishing in the area was vested in the Federal rather than the Territorial government, and (2) the Federal government is the authority which traditionally controls all Indian fishing rights. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 268. As power was thus fused, a single sovereign controlled all of Alaska's fishery during the Territorial period. But that never meant that complete uniformity was established. As Cohen points out "[i]n many conservation statutes the [Alaska] natives are given special privileges". *Id.* 408. See also discussion of

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[2] This statute has been held to continue the prohibition of State regulation of Indian hunting and fishing on Indian Reservations to which the provisions of Public Law 280, 83rd Cong. have been extended. *Klamath & Modoc Tribes* v. *Maison*, 139 F. Supp. 634 (D. Ore., 1956).

Alaska native hunting and fishing rights in COHEN, *op. cit.* 407-409.

If Congress had wanted to accomplish what appellees suggest, namely to protect the Metlakatla Fishery Reserve against invasion by private fishermen but permit the entry of the State for purposes of regulation, it would have done so through the Alaska Statehood Act. Yet neither the wording of that statute nor its legislative history support such a theory.

If all that Congress had intended to do with regard to Metlakatla is preserve the exclusive character of the Reserve, it would surely not have reserved to itself the sweeping and all-encompassing powers which the phrase "absolute jurisdiction and control" implies. That phrase, it must be remembered, was previously used in the Indian disclaimer clauses of other Statehood Acts. These clauses have invariably been held to exclude State jurisdiction. See Metlakatla Br. 50-51. When Congress included the traditional Indian disclaimer clause in the Statehood Act and explicitly added the term "fishing rights," it undoubtedly recognized that the State could easily regulate a fishing right out of existence and that the natives were thus in need of protection against State regulation.[3]

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[3] Just as the anti-fishtrap regulation would destroy Metlakatla's cannery, unrealistic opening and closing dates set under Alaska regulations could destroy all of Metlakatla's fishing. The Secretary of the Interior was well aware of this possibility when he adopted Alaska's opening and closing dates as part of his own regulations. With regard to the Clarence Strait District, which includes the Metalakatla Reserve, he stipulated that its opening and closing dates *must* harmonize with those in the General Section of the Southern District. 25 C.F.R. § 88.2(d). Thus Metlakatla cannot be singled out by the State for punitive restrictions.

Nor does the legislative history of the Statehood Act leave any doubt about the intent of Congress to exclude State regulation. Congress has made it wholly clear that the purpose of Section 4 is

> "to protect the natives of Alaska against the possibility of infringement of their property rights by the proposed new state" (H.R. REP. No. 1731, 80th Cong. 2d Sess. 31 (1948));
>
> to "except" from transfer to the State those "fisheries and wildlife . . . which are . . . included within the reserved native rights" (S.REP. No. 1929, 81st Cong., 2d Sess. 1-2 (1950));
>
> "to maintain unimpaired the authority of Congress over the *use and disposition* of native property in Alaska"; (H.R. REP. No. 255, 81st Cong., 1st Sess. 13 (1949)) (emphasis supplied); and
>
> to emphasize that "[t]he right of the Federal Government *to legislate with respect to natives* is not impaired by the bill and cannot be impaired by the State Constitution." S.REP. 315, 82nd Cong., 1st Sess. 2 (1951) (emphasis supplied).

The wording of Section 4 and its predecessors, it must be noted, was hammered out against the background of strong pressure by Indians and Indian-interest organizations for the full protection of native rights. On June 9, 1950, Oliver LaFarge, President of the Association on American Indian Affairs, wrote to Senator Joseph C. O'Mahoney, then Chairman of the Senate Committee on Interior and Insular Affairs:

> "Alaska is our last frontier. There is serious danger, unless the nation take steps to prevent it, that Alaskan frontier development may involve the despoliation of the native and Indian people . . .
>
> The United States must require that Alaska pledge its respect for these commitments of the

> nation in the legislation under which Alaska seeks to enter the Union. Such an expressed commitment would merely confirm existent rights; it would not change them. But the absence of that pledge would be an open invitation to Alaska to disregard the rights of its many thousands of Indians, Aleut, and Eskimo citizens." See Appendix B, pp. 2a-3a.[4]

That such pleas did not go unheeded is demonstrated by the subsequent comment of Senator Clinton P. Anderson, then a member of the Senate Committee on Interior and Insular Affairs and now its Chairman, in a letter to THE NEW YORK TIMES:

> As one who participated in all of the exhaustive hearings and executive sessions which led to a virtual re-writing of the bill by the Committee, I can state categorically that no provision in the entire measure received greater attention, thought, and painstaking care than did the disclaimer clause from which I have just quoted. We had the able technical assistance of Indian experts from the Department of the Interior and the Department of Justice. Careful research was done on the language of similar disclaimer clauses in previous enabling acts and their interpretation by the Courts, as well as in the law and decisions with respect to Alaska. THE NEW YORK TIMES, Sunday, April 11, 1954, p. E 10.

Senator Anderson used the occasion to allude to certain political realities which the authors of the Statehood bill considered in drafting Section 4: "Most of the members of the Committee have strong Indian constituencies . . ." *Ibid.*

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[4] For additional evidence of Indian pressure on Congress in connection with native rights clauses in the Alaska Statehood Act see statement of Delegate Bartlett. 96 Cong. Rec. 11869-80 (1950).

When Congress thus acted to protect native rights against "the possibility of infringement by the new state", it knew of Metlakatla's fish traps (see 96 Cong. Rec. 11879 (1950)) and of Alaska's strong opposition thereto. See e.g., Testimony of Ernest Gruening in *Hearings Before Subcommittee on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs,* 85th Cong., 1st Sess. 306 (1957). It clearly acted with care and deliberation when it insisted that Indian fishing rights remain under the "absolute jurisdiction and control" of the United States.

Added support for appellant's interpretation of Section 4 can, of course, be found in the unequivocal action of the Secretary of the Interior, who has never waivered in his interpretation of Section 4 of the Alaska Statehood Act as excluding State regulation of Indian fishing rights. The authorities for giving the Secretary's interpretation of the statute "considerable weight" are set forth in Metlakatla Br. 31-32.

In their brief, appellees seek to equate lack of State regulation of the Metlakatla fishery with lack of all regulation. Alaska Br. 43-44. They contend that Metlakatla cannot claim the right "to be free of regulation." *Id.* at 42. Metlakatla most certainly does not claim such a right. It has during the entire period since Alaska's accession to Statehood been under Federal regulation and has rigidly adhered to the conservation regulations promulgated by the Secretary of the Interior. These regulations do in fact follow closely the State of Alaska's scheme of regulation, 25 C.F.R. § 88.2 (a), departing from it only to allow a total of 11 Indian fish traps, Id. § 88.2 (e), and to safeguard Metlakatla's Reserve against discriminatory restric-

tions, § 88.2 (d).[5] Competent authorities have asserted that properly regulated fish traps are no greater threat to sound conservation than seine boats and are in fact, far easier to police. See, e.g., Testimony of Warner W. Gardner, Assistant Secretary of the Interior, in *Hearings on S. 1446 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce,* 80th Cong., 2d Sess. 7 (1947).

Federal regulation has thus in no way prevented the execution of a comprehensive conservation scheme. The fact that two sovereigns collaborate in enforcing that scheme is in no way unusual. Salmon conservation on the Columbia River and its tributaries, for example, is the responsibility of the States of Oregon, Washington and Idaho. Migratory birds are protected by treaties between Canada and the United States. See *Missouri* v. *Holland,* 252 U.S. 416 (1920).

Cases such as *Ward* v. *Race Horse,* 163 U.S. 504 (1895), *New York* ex rel. *Kennedy* v. *Becker,* 241 U.S. 556 (1916), and *Tulee* v. *Washington,* 315 U.S. 681 (1942) have, as appellees correctly point out (Alaska Br. 43), no bearing on this case because they involve off-reservation hunting and fishing rights.[6] In the instant case we are dealing with on-reservation Indian rights which have consistently been protected by the courts against State regulation. See *Klamath & Modoc Tribes* v. *Maison,* 139 F. Supp. 634 (D. Ore., 1956).

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[5] See Fn. 3, *supra,* p. 5.

[6] The force of the *Race Horse* case has been substantially reduced by *United States* v. *Winans,* 198 U.S. 371 (1905), and *Seufert Bros. Co.* v. *United States,* 249 U.S. 194 (1919). See discussion of these cases in *State* v. *Arthur,* 74 Ida. 251, 261 P. 2d 135, 138-139, cert. den. 347 U.S. 937 (1954).

One added reason cited by the State in support of its contention that State regulation of the Metlakatla Fishery Reserve is permitted is that "[Metlakatla] is not, and has never been treated as what is normally termed an Indian reservation." Alaska Br. 44. Even if this statement as to the treatment of the Reserve were true, it would have no bearing on the applicable law, in view of the fact that Congress has, as has just been shown, explicitly reserved to itself jurisdiction over Indian fishing rights in Alaska. But the fact is that appellees' statement is not true. That statement as well as similar assertions in the opinions below[7] are evidently founded on a lack of knowledge by the Alaska bench and bar of the true facts concerning Indian reservations in the lower 48 states.

Appellees and the Alaska courts seem to have fallen victim to certain romantic notions of Indian reservations, commonly held in the Eastern United States. Indians are pictured as still living wholly apart from the rest of the population, following their ancient traditions and perhaps even wearing aboriginal dress, preferably including war bonnets. Alaska's natives, appellees say, do not live that way, and are therefore "different".

The fact is that to anyone familiar with American Indian affairs, the Metlakatla Reservation will appear very similar to many of the reservations of the Western United States. As the Circuit Court of Appeals for the Ninth Circuit[8] observed in *Alaska* v. *Annette Island*

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[7] See also *United States* v. *Booth*, 17 Alaska 561, 161 F. Supp. 269 (D. Alas., 1958).

[8] That Court truly was in a position to make an expert comparison between Alaska Indians and other American Indians. As the ninth circuit then covered Arizona, Nevada, California,

Packing Co., 289 F. 671 (9th Cir., 1923), cert. den. 263 U.S. 708 (1923):

> There can be no question therefore but that the Metlakahtla Indians are wards of the government. They are dwelling on the island at the sufferance of the government and on land which belongs to the United States. The purposes sought to be accomplished by the government are the same as its purposes for all Indian reservations, to encourage, assist, and protect the Indians in their efforts to acquire habits of industry, become self-supporting, and advance in the ways of civilized life. At 674.

That the Court of Appeals was fully justified in drawing this parallel and would be even more justified if it drew it today can be demonstrated by analysis of the points cited by appellees as distinguishing Alaska Indians from other American Indians. The fact is that there is nothing unique about the Alaska Indians' right to vote, see *Harrison* v. *Laveen*, 67 Ariz. 337, 196 P. 2d 456 (1948); *Trujillo* v. *Garley* (U.S. D.Ct. for D. N.M., Aug. 11, 1948, unreported), nor about their ability to be elected to high office.[9] Nor is it unusual for an Indian reservation to contain a group of one particular ethnic stock joined with Indians of different ethnic origin,[10] or to see a State authority grant welfare

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Oregon, Washington, Idaho and Montana, about half of the Indian country of the lower 48 states was under the Court's judicial supervision.

[9] A Rosebud Sioux, Benjamin Reifel, now represents the first district of South Dakota in the United States House of Representatives. CONGRESSIONAL DIRECTORY, 1961 Ed., 150-151. No one has suggested that this gives the State of Dakota the power to regulate Indian hunting on the Rosebud Sioux Reservation.

[10] See *e.g.*, 18 Stat. 28, 43 Stat. 246.

assistance to reservation Indians.[11] Furthermore, appellees' statement that Metlakatla has "no tribal organization" is based on the misconception that to be tribal an Indian governmental organization must still exist in its aboriginal form. That Indian communities have often taken on new governmental forms, organized not along aboriginal, ethnologically homogeneous lines but along modern, political ones is pointed out in COHEN, HANDBOOK OF FEDERAL INDIAN LAW 268, see also 126 ff. Finally, appellees' assertion that the schools in the area are furnished by the State is wholly misleading. The State of Alaska has never furnished schooling to the Metlakatla Indian Community except when Federally assisted. Like many other Western states it has assumed responsibility for the operation of Indian schools only after being assured of a Federal subsidy under the program for impacted-areas aid to education. See 20 U.S.C. 645. It has consistently received such a subsidy for the education of Metlakatla children for no other reason but that they lived on an Indian reservation. See Appendix C, p. 3a.[12]

CONCLUSION

As has heretofore been pointed out, the impact of Metlakatla's fish traps on the total economy of Alaska is insignificant. Yet to Metlakatla's economic existence they are vital. Congress and the Secretary of the Interior weighed the relevant economic factors and decided to continue Federal jurisdiction over Metlakatla's

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[11] *Acosta* v. *San Diego County*, 272 P. 2d 92 (Cal. App., 1954).

[12] The annual Federal subsidy for Metlakatla children for the last three years has amounted to from $443 to $492 per child, sums which compare favorably with nation-wide norms.

rights. Appellant is here to ask this Court to protect the rights which the legislative and executive branches of the Federal government have granted it.

Respectfully submitted,

RICHARD SCHIFTER
THEODORE H. LITTLE
Attorneys for Appellant

Of Counsel:

ALAN L. WURTZEL
STRASSER, SPIEGELBERG, KAMPELMAN
& MCLAUGHLIN

December 12, 1961

APPENDIX

APPENDIX

APPENDIX B

COPY

ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.
48 East 86th Street
New York 28, New York

June 9, 1950

The Honorable Joseph C. O'Mahoney
United States Senate
Washington, D. C.

Dear Senator O'Mahoney:

It is our understanding that the Senate Committee on Interior and Insular Affairs plans to take final action on the Alaska Statehood Bill, H. R. 331, on Monday, June 12, or during that week.

The rights, and in fact the destiny, of the native and Indian people of Alaska are at stake in the Senate decisions to be made, since the Committee, according to its Print on this bill, is considering amendments which eliminate all guaranties of the property rights of these people.

It is our confirmed judgment that an Alaska Statehood Bill without such guaranties will put all native land rights in Alaska in jeopardy. The history of Indian land protection in the United States supports that view.

Prior to the policy of statehood guaranties of native rights, the fraud and violence committed against Indians on the American frontier became known as a "Century of Dishonor." Solemn Federal promises to respect Indian possessions were again and again violated or forgotten as soon as the Federal authority over territories was withdrawn. The State of Georgia openly defied the United States Supreme Court to carry out its decisions upholding Indian land rights in Georgia under Federal treaties. In other States, as, for example, in Kansas and Missouri, In-

dian restricted lands were rapidly alienated through forced sales to meet high state-imposed taxes. The United States Supreme Court later declared these taxes invalid, but the damage had been done. Indians of Georgia, Texas, Kansas, and Missouri, are still waiting for redress for wrongs suffered at the hands of those States in the 1830's and 1850's.

About 70 years ago, when the public conscience had been deeply aroused, Congress adopted a new policy to ensure respect for Federal promises to our Indian tribes. It is now an honored American tradition that a new State, seeking admission to the Union, must pledge its respect for the land rights and all other rights of native communities within its borders. Every State admitted since the 1870's—Montana, North Dakota, South Dakota, Washington, Idaho, Wyoming, Utah, Oklahoma, Arizona, and New Mexico—willingly gave that pledge. Hawaii offers a similar pledge today in another statehood bill now before the Senate Committee. These pledges have been honored, and the Indians in those states have had a measure of security in their lands and possessions unknown to their kinsmen in other areas in earlier years.

Alaska is our last frontier. There is serious danger, unless the nation takes steps to prevent it, that Alaskan frontier development may involve the despoliation of the native and Indian people. The United States guaranteed in the Russian Cession Treaty of 1867 that these natives and Indians would be protected in their property. In the First Alaskan Organic Act of May 17, 1884, Congress made the pledge more specific, and promised that within the Territory of Alaska all Indians and Eskimos would be protected "in the possession of any lands actually in their use or occupation or now claimed by them." This pledge was repeated and amplified in the Act of March 3, 1891 and the Alaska Act of May 1, 1936. The Supreme Court of the United States has confirmed these commitments and again and again, as in the recent Karluk case, which this

Association helped carry to a successful conclusion, has had to intervene to protect Alaskan native possessory rights.

The United States must require that Alaska pledge its respect for these commitments of the nation in the legislation under which Alaska seeks to enter the Union. Such an expressed commitment would merely confirm existent rights; it would not change them. But the absence of that pledge would be an open invitation to Alaska to disregard the rights of its many thousands of Indian, Aleut, and Eskimo citizens.

We feel sure all Americans of good will join us in appealing to you to require in the Alaska Statehood Bill now before you a strong pledge protecting the land rights of natives and Indians on our last frontier.

Sincerely yours,

OLIVER LA FARGE,
President

OLF/D

APPENDIX C

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
WASHINGTON 25, D. C.

December 8, 1961

Mr. Richard Schifter
Room 300
1700 K Street, N. W.
Washington 6, D. C.

Dear Mr. Schifter:

This letter will provide the information you requested by telephone on December 7, 1961, regarding Federal pay-

ment under Public Laws 874 and 815 to the State of Alaska for the children connected with the Annette Island Reserve located at Annette Island.

The organized school districts in Alaska each submit their applications and receive their Federal entitlement as provided under these two public laws. As you know, a large part of Alaska is unorganized territory and not in any school district. For the purposes of Public Laws 815 and 874, the entire unorganized territory is considered as one school district administered by the State Department of Education acting in the nature of a local school board. The State Department of Education prepares the application under each law listing all of the Federal properties located in the unorganized territory and the children connected with each property. The Federal entitlement under this over-all project is paid to the State Department and used by it together with other State and local funds to finance the operations of public schools located in the unorganized territory.

Applications submitted under Public Law 874 must list each Federal property claimed as a basis for Federal entitlement and the number of school children on each Federal property and also the number who live in a taxable home with a parent employed on each Federal property. The Federal entitlement, however, is computed on the basis of the average daily attendance during the school year of all federally connected children in the school district. It is not computed separately for the children connected with each property. Thus, the Federal entitlement a school district receives for children connected with one Federal property when it claims more than one property as the basis for its Federal entitlement must be on a derived or estimated basis. We have estimated the Federal entitlement paid to the State of Alaska for the children who live on the Annette Island Reserve in the following manner: Determined the percent that the number of children living

on Annette Island Reserve is of the total number of children living on Federal property claimed by the Alaska State Department of Education under the project application each year. This percentage, then, is applied to the total entitlement paid this school district for all children claimed in the application who live on Federal property.

The figures presented below show the total entitlement to the State Department of Education for the unorganized territory application for the years 1959-60-61 (fiscal years) and the estimated amount of that entitlement attributable to the children residing on Annette Island Reserve. In 1959 a total of $3,500,466.57 was paid to the State of Alaska under this application. The 300 school children who lived on Annette Island Reserve were .0299% of the 10,010 children living on Federal property in the unorganized territory. This yields an estimated entitlement for the average daily attendance of these 300 children of $104,663.64 at a rate of $443.49 per child. In 1960 a total of $4,217,936.88 was paid to the State of Alaska and the 244 children living on the Annette Island Reserve were .0231% of the 10,542 children living on Federal property in the unorganized territory. This yielded an estimated entitlement for these children of $97,610.04 at a rate of $492.98 per child. In 1961 the entitlement paid to the State of Alaska for this purpose was $4,972,488.36 and the 246 children on the Reserve constituted .018% of the 13,616 children living on Federal property in the unorganized territory. This yielded an estimated entitlement for the Annette Island Reserve children of $89,045.40 at a rate of $468.66 per child.

In 1957 the Alaska State Department of Education allocated part of the entitlement it received under Public Law 815 for increases in federally connected children in the unorganized territory for the period June 30, 1956 to June 30, 1958 to construct a six classroom school building with necessary auxiliary facilities on Annette Island at a cost

in Federal funds of $298,472. Nonfederal funds provided the equipment for this building.

I hope this information will be helpful to you.

Sincerely yours,

B. ALDEN LILLYWHITE
B. Alden Lillywhite
Associate Director for
Federally Affected Areas

FREE COPY

No. 327 & 3

FILED
AUG 20 1959
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

ORGANIZED VILLAGE OF KAKE, *Appellant,*

vs.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee.*

ANGOON COMMUNITY ASSOCIATION, *Appellant,*

vs.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee.*

ON APPEAL FROM THE DISTRICT COURT FOR THE STATE OF ALASKA

STATEMENT AS TO JURISDICTION

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THE ARGUS PRESS, SEATTLE

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WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee.*

ON APPEAL FROM THE DISTRICT COURT FOR THE STATE OF ALASKA

STATEMENT AS TO JURISDICTION

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In the

Supreme Court of the United States

OCTOBER TERM, 1959

ORGANIZED VILLAGE OF KAKE, *Appellant,*

vs.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee.*

ANGOON COMMUNITY ASSOCIATION, *Appellant,*

vs.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee.*

No. .....

ON APPEAL FROM THE DISTRICT COURT FOR THE STATE OF ALASKA

STATEMENT AS TO JURISDICTION

Appellants are appealing from a judgment of dismissal of their complaints for injunctive relief entered by the District Court for the State of Alaska, Division Number One, Juneau, Alaska, on July 2, 1959. This Jurisdictional Statement is submitted to show that the Supreme Court has jurisdiction of this appeal and to show that a substantial question is presented under the rules of this court.

THE OPINION BELOW

The opinion of the court below was rendered July 1, 1959, and is unreported at this time. If eventually

selected for reporting in the Alaska Reports, it will be reported in 18 Alaska Reports. A copy of the opinion is included in Appendix 1.

JURISDICTION

1. The suit of the appellants is one to enjoin the enforcement of certain Alaska criminal statutes (17 SLA 1959, 95 SLA 1959) which purport to make it a crime for them to install, maintain and operate floating fish traps at sites authorized by the Secretary of the Interior in the waters of Alaska. Injunction is sought on the grounds that the Alaska statutes, as to the appellants, are in conflict with federal statutes and regulations.

2. The District Court for the State of Alaska, Division Number One, Juneau, Alaska, entered the judgment dismissing the complaints of appellants on July 2, 1959.

Oral notice of appeal was entered on July 1, 1959, following the rendering of the opinion upon which the judgment was later entered. Notice of appeal to the Supreme Court of the United States was filed August 6, 1959, in the District Court for the State of Alaska, Division Number One, Juneau, Alaska.

3. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 USC 1257 (1) and (2). The District Court of Alaska is the highest court of the State of Alaska in which a decision could be had. The *Coquitlam v. United States* (1896) 163 U.S. 346, 16 S.Ct. 1117, 41 L.ed. 184; *Lindeberg v.*

Howard (CCA 9th 1906) 146 F. 467, CCA 23, 8 Ann. Cas. 709. Article XV, Section 17 Constitution of the State of Alaska. Although appellate review formerly could be had in the Court of Appeals for the Ninth Circuit, that court has decided it cannot take jurisdiction of cases decided by the District Court of Alaska after January 3, 1959. *Parker v. McCarrey,* No. 16,499 .....F.(2d).....

4. The cases believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal are as follows:

Gully v. First National Bank, 299 U.S. 109, 81 L.ed. 70, 57 S.Ct. 96;

Mallinckrodt Chemical Works v. Missouri, 238 U.S. 41, 59 L.ed. 1192;

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 73 L.ed. 184.

5. The provisions of the statutes involved are lengthy and they are set forth in Appendix 4. The citations are as follows:

43 Stat. 464, 48 USC 221 (1924)
43 Stat. 464, 48 USC 222 (1924)
72 Stat. 339 (1958)
67 Stat. 29, 43 USC 1301 (1953)
Constitution of the State of Alaska, Article XII, Section 12
24 F. R. 2053, 2056, Section 102.10 and 115.26
1959 Session Laws of Alaska, Chapter 17
1959 Session Laws of Alaska, Chapter 95
1957 Session Laws of Alaska, Chapter 170
48 Stat. 985, 25 USC 465 (1934)
73 Stat. 141 (1959).

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Is all authority to administer and manage the fish and wildlife resources of Alaska for the year 1959 reserved to the Federal Government by the terms of Section 6(e) of the Alaska Statehood Act, 72 Stat. 339, so as to make the Alaska criminal statutes 17 SLA 1959 as amended by 95 SLA 1959, unenforceable against the appellants by the State and its officials and so as to make the regulations issued by the Secretary of the Interior (24 FR 2053, *et seq.*) March 7, 1959, allowing appellants to fish the trap sites therein designated a valid exercise of that authority?

2. If Section 6(e) of the Alaska Statehood Act, 72 Stat. 339, does purport to reserve such control to the Federal Government and thereby render inapplicable the Alaska criminal statutes, does Section 6(e) violate the "equal footing" doctrine governing the admission of new States to the Union?

3. Does the Alaska Statehood Act, 72 Stat. 339, in Section 4 thereof and in its adoption and ratification of the Alaska Constitution (in this instance specifically Article XII, Section 12 thereof) comprehend a permanent disclaimer by the State of Alaska of control over Indian fishing within the State, and IF SO, IS SECTION 4 ~~further are the~~ of the Statehood Act an assumption of permanent jurisdiction (subject to further act of Congress) by the Federal Government over the location and manner of Indian fishing within the States, and further are the regulations issued by the Secretary of the Interior (24

FR 2053, *et seq.*) March 7, 1959, allowing appellants to fish the trap sites therein designated a valid exercise of that authority?

4. If the Alaska Statehood Act does so comprehend a permanent disclaimer by the State of Alaska, and a permanent assumption of jurisdiction by the Federal Government, does it violate the "equal footing" doctrine governing the admission of new States to the Union?

STATEMENT OF THE CASE

Appellants are Federal Corporations, chartered as organized Indian Villages under the provision of the Wheeler-Howard Act, 48 Stat. 985, 25 USC 465 (1934). Membership in each corporation includes all the inhabitants of the Thlinget Indian villages of Kake, Alaska (numbering 400), and of Angoon, Alaska (numbering 300). The village of Angoon is located on the southwest side of Admiralty Island, Alaska, approximately 60 miles southwest of Juneau, Alaska, and the village of Kake, Alaska, is located on the northwest side of Kupreanof Island, Alaska, approximately 100 miles southwest of Juneau, Alaska. In 1948 the United States of America purchased two salmon canneries including fish traps and related gear taking title in its own name, naming the appellants as beneficiaries; thereafter appellant Kake commenced doing business under the name of KEKU CANNING Co., and appellant Angoon commenced doing business as HOOD BAY SALMON Co., that from 1948 to date appellants have operated these canneries in the processing of salmon

caught through use of fish traps; that the operation of the canneries and utilization of the fish traps was undertaken by the appellants for the purpose of furnishing employment for the members of the Angoon Community Association and the Organized Village of Kake Alaska, and to provide a means of allowing them to have their social and economic welfare advanced through self-employment designed to promote the advancement of the people of the said community and village in a manner compatible with the intention of Congress of the United States to care and provide for the social and economic welfare of the Indian. That at this time, the appellants' canneries constitute the sole means of support for substantially all inhabitants of Angoon and Kake through direct payroll, fish purchases and profit distribution.

On July 7, 1958, Congress enacted the Alaska Statehood Act, 72 Stat. 339, under the terms of which the Alaska Constitution was ratified and affirmed. Under Section 4 of the Statehood Act, the State disclaimed all right and title to land and property which Congress reserved to the control of the United States, namely "to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts. . . . " The Third Ordinance of the Constitution of Alaska abolished all use of fish traps in Alaska. Section 6(e) of the Statehood Act withheld control of the Alaska fish and wildlife from Alaska until the Secretary of the Interior certified the transfer. In November, 1958, the Secretary of the Interior announced his intention to abolish fish traps in Alaska

with the exception of native owned traps. On February 25, 1959, and April 17, 1959, the legislature of Alaska enacted 17 SLA 1959 and 95 SLA 1959 making it a crime to erect, moor, or maintain fish traps in Alaska. On March 7, 1959, the Secretary of the Interior issued his 1959 fishing regulations for Alaska and authorized appellants to use seven (7) of their thirteen (13) trap sites for 1959. The Secretary of the Interior on March 10, 1959, advised appellants they could use their traps and could proceed to plan for 1959 accordingly. On or about May 21, 1959, appellee publicly noted his intention to prevent appellants from operating their traps, and on or about June 1, 1959, appellee dispatched two patrol boats manned with armed officers of the State of Alaska to patrol the area of appellants' trap sites, and on June 15, 1959, appellee caused the arrest of the president of the Council of appellant Kake and the seizure of one of its fish traps. The appellants sued to enjoin the enforcement of 17 SLA 1959 and 95 SLA 1959. The complaints alleged that the appellants would suffer irreparable harm unless the appellee was restrained for two reasons: (1) although a portion of the damages could be equated with money, the laws of Alaska prevent a suit for damages against appellee, (2) a large portion of the damages could not be equated with money. Appellants further alleged that they cannot operate their canneries without the use of fish traps, and that they would be forced to drastically curtail their operations to the point of shut-down, thus causing loss of investment, loss of payroll to their members, and

destruction of the economy of their villages of Kake and Angoon.

How the Federal Question Is Presented

Appellants based their suit on the grounds that exclusive control over the management of fish and wildlife in Alaska was reserved to the Federal Government for 1959, and that control over the Indian fishery was reserved to the Federal Government until further act of Congress and therefore the Alaska criminal statutes were of no application in view of the regulation of the Secretary of the Interior allowing appellants to fish their traps (Complaints, Tr. 6, 29). The appellee filed motions to dismiss appellants' complaints on the grounds they failed to state a cause of action (Tr. 52, 54). Briefs were filed by appellants (Tr. 181) and appellee (Tr. 68), and hearing had. After the hearing the District Court entered orders of dismissal of the complaints (Tr. 145, 146) in accordance with its opinion that the Alaska criminal statutes involved were enforceable as to the appellants, that the Secretary of the Interior was without authority to allow the appellants to fish their traps, and that the doctrine of "equal footing" gave Alaska as a state full control over all fishing within Alaska, Federal statutes notwithstanding (Tr. 133).

Appellants gave oral notice of appeal in the District Court of the State of Alaska and moved for a preliminary injunction pending appeal to the Supreme Court of the United States. The motion was denied, and application was then made to Mr. Justice Brennan

for a preliminary injunction pending appeal to the Supreme Court of the United States. This application was granted and the appellee was enjoined from interfering with appellants' fish trap operations pending the filing and determination of this appeal.

The Questions are Substantial

This appeal involves the immediate question of whether or not the appellants can fish with fish traps in Alaska when they are authorized to do so by the laws of the United States and when they are prohibited from doing so by the laws of Alaska. The resolution of this question raises issues of vital importance to future Federal-State relationships in the field of control of fish and wildlife and in the field of control of Indian welfare. Appellants rest their claim to fish their traps on an assertion that the Federal Government has exclusive power to not only provide for Indian welfare but also to exercise a measure of control over the fish and wildlife of a State in providing for the Indian welfare. This claim has been denied by the District Court of the State of Alaska on the grounds that the Constitutional right of the State of Alaska to be admitted into the Union "on equal footing" with the other States would be infringed upon if the State was denied the right of exclusive control over its fish and wildlife. The frustration of Federal control over the welfare of the Indian that would result from State control in this instance was not considered a deterrent to State control. The claim of right of the appellants is based directly upon the language of the Alaska State-

hood Act, 72 Stat. 339, and the regulations of the Secretary of the Interior issued thereunder, 24 CFR 2053-2069. The language in the Act relied upon by the appellants has never before been used in statehood legislation, and a factual background similar to that of appellants has never before become involved in litigation involving interpretation of statehood legislation. For that reason, the far-reaching forecast of *Coyle v. Smith*, 221 U.S. 559, 55 L.ed. 853, and all subsequent equal footing cases whose decisions rest thereupon, do not now foreclose inquiry into these issues.

Appellants seek to restrain the enforcement of the criminal statutes of the State of Alaska. Application for injunctive relief is based upon the claim that unless the appellee is restrained, appellants will suffer irreparable harm through seizure of their equipment, loss of profits, imprisonment of their employees, loss of payroll to their members and general rupture of their economy for which either no action at law lies against the appellee under the laws of Alaska or for which money damages would not be an adequate remedy for the loss. Circumstances such as these warrant the issuance of an injunction to prevent the enforcement of the State criminal statute involved. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 69 S.Ct. 968 (1949). Appellants' right of fishery is a property right entitled to the protection of injunction, *Hynes v. Grimes Packing Co., supra.*

The Alaska Statehood Act, 72 Stat. 339, expresses a congressional intent to withhold control of the fish and wildlife resources within Alaska from Alaska for

the year 1959, and also to withhold such control as is necessary to allow the Federal Government to exercise exclusive control over Indian fishing in Alaska until such time as Congress releases that control to the State.

Section 6(e) of the Act expressly denies to Alaska any power of control over its fish and wildlife until certain conditions are met in "the broad national interest." The time limit therein expressed has been since defined, and Federal control will cease January 1, 1960. Congress has exercised absolute control over the fish and wildlife in Alaska since it was acquired as a Territory, and in that exercise has delegated supervision to the Secretary of the Interior under the White Act, 43 Stat. 464, 48 USC 221 (1924). Pursuant to that legislation, the Secretary has issued regulations from year to year governing the taking of salmon in Alaska. Violation of the regulations invokes the sanctions of the White Act, including fine, imprisonment and seizure of equipment. The Secretary issued his 1959 regulations on March 7, 1959, 24 CFR 2053-2059 and expressly allowed appellants to fish certain traps, and at the same time prescribed complete regulations for taking of salmon in Alaska for the year 1959. Under these circumstances, no criminal statute of Alaska could have any force and effect in regulating how appellants shall fish in the waters of Alaska in 1959.

Section 4 of the Alaska Statehood Act comprehends a complete reservation of control by Congress unto the Federal Government over Indian fishing in Alaska. This section expressly reserves to Federal control "any

lands or other property (including fishing rights) the right or title to which may be held by any Indians, Eskimos, or Aleuts . . . or is held by the United States in trust for said natives . . ." Considerable speculation has been voiced by appellee as to what this section does not mean. However, the language is plain that Indian fishing is not to be controlled by the State until Congress otherwise directs. Similar language appears in Article XII, Section 12, of the Alaska Constitution, which is made a part of the Alaska Statehood Act by those provisions in the preamble of the Act ratifying the Constitution. The fact that the appellants were exercising a fishing right through the use of fish traps owned by the United States as trustee at the time Section 4 was enacted does much to suggest the language of Section 4 was tailored to cover that very situation. The record is clear that the Secretary of the Interior interpreted this section of the Statehood Act to allow the appellants to continue fishing as they had in the past subject to his regulation. This interpretation is entitled to great weight in determining what Congress intended by Section 4 if there is any ambiguity in that language. *Fawcus Machine Co. v. U.S.*, 282 U.S. 375.

Appellee has urged that no matter what control is withheld from Alaska by Section 6e or Section 4 of the Statehood Act, the Secretary of the Interior cannot specially allow appellants to fish their traps and deny all others that right, because such action violates the White Act prohibition against the grant of an exclusive fishery by the Secretary, 43 Stat. 464, 48 USC 222. Section 4, however, by providing specially for Indian

fishing under Federal control, must be considered to have amended the White Act to that extent. Section 6e declares that administration for 1959 by the Secretary must be "under existing laws." The preamble to the Statehood Act makes the Constitution of Alaska "existing law," and in so doing brings into play the language of Article XII, Section 12 thereof which also provides specially for Indian fishing, and to that extent likewise amends the White Act, even for the year 1959.

Congress has the right to either withhold complete control of the fish and wildlife in Alaska from Alaska or to withhold such control as is necessary to provide for the welfare of the Indian. Neither type of withholding violates the "equal footing" doctrine. As to the Indian alone, the exclusive right of the Federal Government to exercise control over the Indian has been long recognized as an exercise of the Constitutional power given the Federal Government and not a violation of the doctrine of "equal footing." The welfare of the Indian is not something peculiarly within the sovereignty of a State. *Coyle v. Smith, supra; U.S. v. Sandoval,* 231 U.S. 34, 58 L.ed. 107; *US. v. Chavez,* 290 U.S. 357. As to the complete control of the fish and wildlife, the question has not before been squarely presented to the Court. However, the *Coyle v. Smith* case clearly excludes areas dealing with property from State control under "equal footing," as opposed to those areas dealing with political rights. Regulation and management of the fish and wildlife suggests a problem in property rather than in politics. The decisions of this Court in *Manchester v. Massachusetts,* 139 U.S. 240, 35 L.ed.

159, and *Skiriotes v. Florida,* 313 U.S. 69, in upholding State control of fish and wildlife with special emphasis on the absence of conflicting Federal legislation in each instance likewise suggest that this is a field for Federal control if Congress elects to enter it.

The nature of this case and the rulings of the District Court of the State of Alaska are such as to bring the case within the jurisdictional provisions noted in Title 28 and the cases hereinbefore cited to sustain the jurisdction. Appellants filed their case in the District Court of the State of Alaska, which is the highest court in the State of Alaska in which a decision could be had. Their complaints were based upon a right to fish certain traps pursuant to express allowance by the laws of the United States, namely 72 Stat. 339, Section 4 and the regulations of the Secretary of the Interior 24 CFR 2053-2059. Appellants' rights under the laws of the United States were thus made an essential element of their cause of action and brought the case within 28 USC 1257 (1) and (2). *Gully v. First National Bank* (1936) 299 U.S. 109, 81 L.ed. 70, 57 S.Ct. 96. The opinion of the Court that the Federal laws upon which appellants relied violated the "equal footing" doctrine and for that reason were of no force and effect against conflicting Alaska law also brings the case within the jurisdictional provisions of Title 28. *Mallinckrodt Chemical Works v. Missouri,* 238 U.S. 41, 59 L.ed. 1192; *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 73 L.ed. 184.

It is submitted that the decision of the District Court

of the State of Alaska fails to recognize the supremacy of Congressional enactments over conflicting State law in the fields of management of fish and wildlife and control of Indian welfare. In so doing, it authorizes the State of Alaska to interfere with the exercise of Indian fishing in violation of the laws of the United States. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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August 15, 1959

APPENDIX 1

OPINION OF THE DISTRICT COURT FOR THE STATE OF ALASKA

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

ORGANIZED VILLAGE OF KAKE, *Plaintiff*, vs. WILLIAM A. EGAN, Governor of the State of Alaska, *Defendant.*	Civil Action No. 8063-A
ANGOON COMMUNITY ASSOCIATION, *Plaintiff*, vs. WILLIAM A. EGAN, Governor of the State of Alaska, *Defendant.*	Civil Action No. 8064-A

and

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE, a federally chartered corporation, *Plaintiff*, vs. WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Defendants.*	Civil Action No. 8066-A

OPINION

Filed July 1, 1959

R. L. JERNBERG, of Gore & Jernberg, Ketchikan, and C. L. CLOUDY, of Ziegler, Ziegler & Cloudy, Ketchikan, for plaintiffs Organized Village of Kake and Angoon Community Association.

ROBERT H. ZIEGLER, SR., and A. H. ZIEGLER, of Ziegler, Ziegler & Cloudy, Ketchikan, for plaintiff Metlakatla Indian Community, Annette Islands Reserve.

JOHN L. RADER, Attorney General of Alaska, JAMES M. FITZGERALD, Special Assistant Attorney General, and DOUGLAS L. GREGG, Assistant Attorney General, for defendants.

KELLY, Judge.

The first two captioned cases were consolidated for trial, and the third was heard the following day. Because of the similarity of the actions, the three cases are consolidated for the purpose of this opinion.

The urgency of this matter makes immediate determination imperative. It would, of course, be desirable if my decision could be based on a written opinion as complete as the able briefs of counsel for both parties filed herein, but time does not permit the preparation of a formal opinion, so it must suffice that I announce my decision from the bench and do as well as possible from notes and excerpts from decisions.

I need hardly state that I agree with counsel on both sides in their expressed regard for the importance of this action now before us for decision.

We have here a conflict between the authority of the Secretary of the Interior, an officer of the United States, and the Governor of Alaska. In this it is not a conflict of these officials as individuals or personalities, but of what they represent in this controversy.

We have in effect the state opposed to the United States.

We have the majesty of the nation on one hand and the sovereignty of the state on the other; in between, three Indian communities whose plight in the dwindling fish economy of Alaska is a matter of grave concern.

Where the exercise of claimed state power and authority collides with the exercise of claimed federal power and authority, the difficult and tender problem of resolving, under existing law and judicial decisions, the questions thus arising, with due regard to the dignity of the one and the sovereignty of the other, becomes the delicate task of the Court.

Able and convincing arguments have been capably presented by counsel for both sides.

The facts are substantially agreed upon and are fully set forth in the pleadings, briefs and recorded statements of counsel.

After reading the pleadings and briefs, hearing the arguments, examining the exhibits and affidavits, and studying numerous authorities, I have concluded that the relief sought in these three cases must be denied and the bills of complaint therein dismissed.

I will try and state my reasons for this decision.

This Court can take judicial notice of the following facts and conditions and matters of general knowledge:

(1) There has long been growing opposition to fish traps in Alaska, and plebiscites held in the Territory in connection therewith have resulted overwhelmingly in votes for the abolishment of traps.

(2) The three Indian villages here concerned as plaintiffs in these actions had voted overwhelmingly for the abolishment of traps.

(3) The salmon runs in Alaska are being rapidly depleted.

(4) The use of fish traps takes great numbers of fish from Alaskan waters for the benefit of the few who own or control the traps.

(5) Even with trap operations, many canneries have been compelled to close in Alaska in recent years, because of lack of an adequate fish supply.

(6) Traps were reduced over the years in number and curtailed in operation, and finally abolished by the state, the well-known purpose of which was to conserve the salmon supply for the benefit of all of the people of the state as a whole.

(7) Financial loss occurred to some who owned or controlled the traps each time they were cut in number or limited in operation.

I find the following statements of the law determinative of the issues in this case. The state owns the tidelands and controls all areas wherein traps were threatened to be installed. In other words, the proposed trap sites are located in inland waters over which the State of Alaska has dominion.

Mr. Justice Reed, in *Alabama v. Texas et al.*, 347 U.S. 272 at page 275, stated:

> "If the marginal lands were thus declared by the *California* and following cases to belong to the United States, they were ceded to the states through the subsequent Submerged Land Act of 1953 by the clause: 'Title to and ownership of the

> lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters . . . are hereby . . . recognized, confirmed, established, and vested in and assigned to the respective States . . ." Sec. 3(a). If, on the other hand, the marginal lands were not declared by those cases to belong to the United States, title to them remained in the respective states. Either by original ownership or by the cession of the Act, the lands are now the property of the respective states . . .

The new State of Alaska is entitled to such powers as have been given to all states by the Submerged Lands Act.

Indian fishing rights do not include the right to fish with forbidden gear or in a manner prohibited to other citizens of the state.

No property right exists in fish traps and their use has been legally prohibited in the state.

The "equal footing" clause has long been held to refer to political rights and to sovereignty and to have a direct effect on certain property rights, and the question arose early in controversies between the states and the federal government as to ownership of the shores of navigable waters, and it was held that to deny to the states, admitted subsequent to the formation of the union, ownership of this property, would deny them admission on an equal footing with the original states. *Pollard's Lessee v. Hagan,* 44 U.S. 212, 228-229 and cases cited.

Upon the admission of a state to the Union the title

of the United States to lands underlying navigable waters within the state passes to it as incident to the transfer to the state of local sovereignty and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. *United States v. Oregon,* 295 U.S. 1, 14.

The lands on which the fish traps are to be moored are tidelands or lands underlying inland waters, and subject to the authority of the state to regulate fishing.

Of course the United States has responsibility under laws passed by Congress toward the Indians. The United States has made treaties—solemn pacts with Indian nations. Indians have been accorded rights by the United States in Territories and in lands controlled by the United States, but many of these rights disappear when a new state is formed. *Ward v. Race Horse,* 163 U.S. 504. In this case, on page 514, Mr. Justice White stated as follows:

> " * * * It may be further, for the sake of the argument, conceded that where there are rights created by Congress, during the existence of a Territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration. * * * "

See also *Kennedy v. Becker,* 241 U.S. 556; *U.S. v. Winans,* 198 U.S. 371 (384). An Indian reservation created by executive order of the President conveys no right of use or occupancy beyond the pleasure of Congress and the President.

When an Indian reservation is established by treaty the right of use or occupancy depends upon the language or the purpose expressed therein.

Congress has power to make a reservation inclusive of the adjacent waters and submerged lands as well as uplands * * *. The reservation thus created is not a private grant but simply a setting apart until otherwise provided by law.

Statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. (See *Alaska-Pacific Fisheries v. United States,* 248 U.S. 78, pages 87 and 89.)

The reservation of the Metlakatla Indians was created at the will of Congress and did not constitute final disposal of the lands underlying the navigable waters. The extension of the 3,000 feet to include exclusive fishing rights by the President likewise did not constitute final disposal but only a grant until otherwise provided by law. The federal government retained jurisdiction thereof until Alaska became a state but upon achieving statehood, dominion and sovereignty thereof passed to the new state, subject only to the authority of the federal government in regulating navigation and commerce. *Pollard's Lessee v. Hagan,* 44 U.S. 212. The

presidential order which extended the exclusive fishing rights 3,000 feet offshore simply prohibited others from fishing therein and cannot be construed to permit the use of traps therein when prohibited by state law.

Under territorial status the Annette Island natives could not claim any vested property right in any particular method or means for taking fish. Their authority to operate a fishery at all came from the Secretary of the Interior under the provisions of the White Act.

The state regulates and controls wildlife resources and fisheries in the marginal sea. This was originally based on a concept of ownership. (*McCready v. Virginia*, 94 U.S. 391). This theory has to some extent been repudiated and the modern concept contemplates that state control is founded upon the power to regulate in the state the protection of these resources for all the people.

The state has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of the people.

Geer v. Connecticut, 161 U.S. 519. See also
Skiriotes v. Florida, 313 U.S. 69;
Toomer v. Witsell, 334 U.S. 385;
Corsa v. Tawes, 149 Fed. Supp. 771.

The right to control fisheries rests in the state in the absence of affirmative action of Congress. *Manchester v. Mass.*, 139 U.S. 240.

Fish and game are owned by the states, not as proprietors, but in their sovereign capacity as the repre-

sentatives and for the benefit of all their people in common. *U.S. v. Shawver,* 214 Fed. 154.

The White Act, 48 USC Sec. 221, was passed by Congress to protect and conserve fisheries in Alaska. It was amended by Sec. 6 (e) of the Alaska Statehood Act, which contained the so-called Westland proviso. The constitution of the State of Alaska became effective simultaneously with the Statehood Act, and with it Ordinance Number Three, which for reasons therein stated, abolished the use of fish traps for the taking of salmon for commercial purposes in all the coastal waters of the State.

If the White Act is amended by Sec. 6 (e) and by Ordinance Number Three as interpreted by the Secretary of the Interior (*Ketchikan Packing Co. v. Seaton,* opinion filed May 14, 1959, United States Court of Appeals for the District of Columbia) then the White Act must prohibit the use of traps in Alaskan waters.

The *Ketchikan Packing* case holds that Congress intended the Secretary to be a trustee for both the federal government and the new state during the transition of administration from the federal to the state authorities in the broad national interest. It further held that the Secretary, in that unique capacity, could not reasonably disregard a valid law of Alaska existing on January 3, 1959, the effective date of the Alaska Statehood Act and the Alaska constitution, and Ordinance Number Three.

The authority conferred upon the Secretary by existing law, as above set forth, should not be permitted

to impair the powers or rights of the new state which come from the status of statehood. To do otherwise would seem to impair the equal footing standing of the new state.

The White Act is still in effect and is the Act from which the Secretary of the Interior derived his authority, and this Act specifically states that every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies and that no exclusive or several right of fishery shall be granted therein. Therefore the White Act forbids exclusive right of fishery. This was the holding in the case of *Hynes v. Grimes Packing Co.*, 337 U.S. 86, at page 122:

> As Sec. 208.23 (r) with its exception in favor of the natives in possession of Karluk Reservation and their licensees is based upon Sec. 1 of the White Act, we think it clear that its proviso that no exclusive or several right of fishery shall be granted therein applies to commercial fishing by natives equally with fishing companies, nonresidents of Alaska or other American citizens and so applies whether those natives are or are not residents on a reservation. We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights * * * The White Act fishing preserves were not intended to furnish a monopoly to a favored few.* * *

There are many cases besides those which I have mentioned which have been cited by counsel in their briefs and arguments which support the conclusions

here reached, that the Secretary of the Interior is without authority to except the fish traps of the plaintiffs from his Order dated March 7, 1959, 24 Fed. Reg. 2053-71, prohibiting the use of fish traps in Alaskan waters effective April 18, 1959; and that the State of Alaska has authority to prohibit all fish traps in Alaskan waters, including those of the plaintiffs, and the plaintiffs are not entitled to the relief here sought.

Findings of fact, if desired, may be presented, together with Judgment and Decree in accordance with this opinion.

RAYMOND J. KELLY
U.S. District Judge

Supplemental Finding of Fact No. 1

The waters of the Alexander Archipelago, State of Alaska, which lie to the landward of a line drawn from Cape Spencer lighthouse at the entrance of Cross Sound, and following generally the sinuosities of the coast, that is, the meander line of mean low water, and bridging headlands and bays as the line is drawn in a general southeasterly direction past Cape Bartholomew, Cape Muzon, and eastward through Cape Chacon and ending at a line drawn from the northernmost extremity of Pt. Mansfield, Sitklan Island, 040° true, to where it intersects the mainland, as more particularly described in 33 C.F.R. 82, 275, are all inland waters and historic bodies of water. Because of historic, social and geographic considerations, of which this court takes judicial notice, and based also on a consideration of the record in this case, I find:

That geographically and geologically the Alexander Archipelago is part of a long mountain range which extends from the southern tip of the so-called Panhandle of Alaska's general land mass in a northwesterly direction, and includes the St. Elias Mountains, the Wrangell Mountains, and the Talkeetna Mountains in Southcentral Alaska.

That the main mass of igneous rocks which intruded the older sediments forms the core of this general land mass. The resulting topography, formed by erosion of the complex fault patterns and contacts between different rock types, and a later partial inundation, is a series of long, narrow arms of the sea, which have encroached upon the general land mass without actually altering its original coastline facing the open sea.

That the general land mass of the Alexander Archipelago retains its mountain-range character with elevations ranging from 2,000 to 6,000 feet, and that the present arms of the sea were at one time river valleys which have been eroded by glacial action, creating the long, narrow fjords which exist today as inland waterways, the only substantial means of surface transportation throughout the Archipelago.

That the historical economy of the area involved is primarily oriented to a marine way of life in which the

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inland waters furnish the primary, and in many areas, the only industry. Said waters are in every respect a necessary and intimate part and parcel of the territory of the State of Alaska.

Supplemental Finding of Fact No. 2

Although plaintiff may suffer some loss if the right to fish by means of fish traps is denied, still I find that the damages alleged are to a large extent speculative in nature because of (1) the limited predictability of the salmon runs, (2) the existence of an independent fleet of seine boats with whom plaintiffs are free to bid for their catch on the basis of the price offered therefor, and (3) the possibility of increased catches by plaintiffs' own seine boats resulting from the abolition of fish traps.

Supplemental Finding of Fact No. 3

The Court judicially notices that fish traps, whether of the floating or pile-driven variety, are customarily affixed to the shoreline with the remainder necessarily extending out over tidelands and beyond into the navigable waters below the meander line of mean low tide.

APPENDIX 2

JUDGMENT OF THE DISTRICT COURT FOR THE STATE OF ALASKA

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

In the Matter of the ORGANIZED VILLAGE OF KAKE, *Plaintiff*, vs. WILLIAM A. EGAN, *Defendant*.	No. 8063-A

ORDER FOR DISMISSAL

THIS MATTER having come on before the Court for final hearing on plaintiff's complaint for a permanent injunction on the 29th day of June, 1959; plaintiff appearing through its counsel, R. L. Jernberg and C. L. Cloudy, and defendant appearing through his counsel, the Attorney General for the State of Alaska, and the Court having heard oral argument and having rendered its opinion, which opinion with supplemental findings of fact is in lieu of findings of fact and conclusions of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiff be and it hereby is dismissed with prejudice.

WITNESS my hand and seal of this honorable Court this 2nd day of July, 1959.

/s/ RAYMOND J. KELLY
District Judge

[Seal]

APPENDIX 2a

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
DIVISION NUMBER ONE AT JUNEAU

In the Matter of the ANGOON COMMUNITY ASSOCIATION, *Plaintiff*, vs. WILLIAM A. EGAN, *Defendant*.	No. 8064-A

ORDER FOR DISMISSAL

THIS MATTER having come on before the Court for final hearing on plaintiff's complaint for a permanent injunction on the 29th day of June, 1959; plaintiff appearing through its counsel, R. L. Jernberg and C. L. Cloudy, and defendant appearing through its counsel, the Attorney General for the State of Alaska, and the Court having heard oral argument and having rendered its opinion, which supplemental findings of fact is in lieu of findings of fact and conclusions of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiff be and it hereby is dismissed with prejudice.

WITNESS my hand and seal of this honorable Court this 2nd day of July, 1959.

/s/ RAYMOND J. KELLY
District Judge

[Seal]

APPENDIX 3

STATUTES INVOLVED

43 Stat. 464, 48 USC 221 (1924)

Fishing areas, closed season, limitation on fishing.

For the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska, the Secretary of the Interior from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein, (b) limit the catch of fish to be taken from an area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable.

43 Stat. 464, 48 USC 222 (1924)

Unlawful fishing in areas no exclusive rights to be granted citizens.

From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish, and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided,* That every such regulation made by the Secretary of the Interior shall

be of general application within the particular area to which it applies and that no exclusive or several right of fishery shall be granted therein nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior.

72 Stat. 339 (1958) Alaska Statehood Act

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled. That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 8 (c) of this Act, the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska entitled, "An Act to provide for the holding of a constitutional convention to prepare a constitution for the State of Alaska, to submit the constitution to the people for adoption or rejection, to prepare for the admission of Alaska as a State, to make an appropriation, and setting an effective date, approved March 19, 1955 (Chapter 46, Session Laws of Alaska 1955), and adopted by a vote of the people of Alaska in the election held on April 24, 1956, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

Sec. 2. The State of Alaska shall consist of all territory together with the territorial waters appurtenant thereto, now included in the Territory of Alaska.

* * * *

Sec. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives); or is held by the United States in trust for said natives that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation . . .

Sec. 6 (e). All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478, 48 U.S.C. secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C. secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: Provided, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws

until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest . . .

Sec. 6 (m). The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session, 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

Sec. 8 (b). At an election designated by proclamation of the Governor of Alaska, which may be the general election held pursuant to subsection (a) of this section, or a Territorial general election, or a special election, there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, by separate ballot on each, the following propositions:

"(1) Shall Alaska immediately be admitted into the Union as a State?

"(2) The boundaries of the State of Alaska shall be prescribed in the Act of Congress approved (date of approval of this Act) and all claims of this state to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States.

"(3) All provisions of the Act of Congress approved (date of approval of this Act) reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people."

In the event each of the foregonig propositions is adopted at said election by a majority of the legal votes

cast on said submission, the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly. In the event any one of the foregoing propositions is not adopted at said election by a majority of the legal votes cast on said submission the provisions of this Act shall thereupon cease to be effective.

Sec. 30. All Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the legislature of said Territory or by Congress, are hereby repealed.

67 Stat. 29, 43 USC 1301 (1953)

Sec. 2. When used in this Act—(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which for-

merly were lands beneath navigable waters, as hereinabove defined.

* * * *

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp and other marine animal and plant life but does not include water power, or the use of water for the production of power.

* * * *

67 Stat. 30, 43 USC 1311

Sec. 3. Rights of the States—

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law, be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof.

ARTICLE XII, Section 12, Constitution of the State of Alaska

The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not

granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, unless otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.

24 FR 2053, 2056, Section 102.10:

Types of gear permitted, salmon fishing. In fishing for salmon all forms of gear other than drift gill nets, set nets, purse seines, beach seines, fish wheels, trolling apparatus, hand lines, rods, spears, and gaffs are prohibited at all times. Traps are prohibited, except native Indian-owned traps specifically authorized in Part 115.

Section 115.26:

Sites open to native Indian traps:

Salmon traps owned and operated by native Indian communities may be operated in 1959 at the following sites:

(a) *Annette Island Fishery Reserve*

(1) Annette No. 3, located at 55°02′47″ N. lat., 131° 38′53″ W. long.

(2) Annette No. 4, located at 55°05′47″ N. lat., 131° 36′39″ W. long.

(3) Annette No. 6, located at 55°00'45" N. lat., 131° 38'30" W. long.

(4) Annette No. 8, located at 55°10'13" N. lat., 131° 19'31" W. long.

(b) *Organized Village of Kake*

(1) Kake-Cape Fanshaw, located at 57°10'52" N. lat., 133°32'44" W. long.

(2) Kake-Point Pybus, located at 57°18'40" N. lat., 133°57'21" W. long.

(3) Kake-Point Mccartney, located at 57°01'23" N. lat., 134°02'50" W. long.

(4) Kake-Cornwallis, located at 56°55'52" N. lat., 134°16'08" W. long.

(c) *Angoon Community Association*

(1) Angoon-Basket Bay, located at 57°36'16" N. lat., 134°51'34" W. long.

(2) Angoon-Eagle Island, located at 57°22'28" N. lat., 134°34'18" W. long.

(3) Angoon-Point Caution, located at 57°13'52" N. lat., 134°39'05" W. long.

17 Session Laws of Alaska, 1959

Section 1. It shall be unlawful to erect, moor or maintain fish traps, including but not limited to floating, pile driven or hand driven fish traps, on or over any lands or tidelands owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska.

* * * *

Section 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed six months or by fine not to exceed $1,000 or by both such fine and imprisonment.

95 Session Laws of Alaska, 1959

Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters provided nothing in this section shall prevent the operation of small hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally operated in or above the mouth of any stream or river in Alaska; nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights) the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives.

Section 2. Section 1 of Chapter 17 SLA, 1959, is hereby amended to read as follows:

Section 1. It shall be unlawful to erect, moor or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or waters, owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska, which are other-

wise legally maintained and operated in or above the mouth of any stream or river in Alaska.

Sec. 3. Sec. 2 of Chapter 17, SLA 1959, is hereby repealed.

Sec. 4. Sec. 3 of Chapter 17, SLA 1959, is hereby amended to read as follows:

Sec. 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed $5,000.00 or by both such imprisonment and fine.

Sec. 5. A violation of this act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year or by a fine not to exceed $5,000.00, or by both such imprisonment and fine.

170 Session Laws of Alaska, 1957

Section 1. Any person or corporation having any claim against the Territory of Alaska shall have a right of civil action against the Territory in the District Court for the District of Alaska.

Section 7. *Exceptions.* The provisions of this Act shall not apply to:

(1) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a territorial agency or an employee of the Territory, whether or not the discretion involved be abused.

48 Stat. 985, 25 USC 465 (1934)

The Secretary of the Interior is hereby authorized in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

* * * *

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

73 Stat. 141 (1959)

Sec. 2 (a). Section 4 of the Act of July 7, 1958 (72 Stat. 339) providing for the admission of the State of Alaska into the Union, is amended by striking out the words "all such lands or other property, belonging to the United States or which may belong to said natives" and inserting in lieu thereof the words "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for natives.

(b) Section 6 (e) of said Act is amended by striking out the word legislative and inserting in lieu thereof the word "calendar."

FILED
NOV 13 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. 323

ORGANIZED VILLAGE OF KAKE and ANGOON COMMUNITY ASSOCIATION, *Appellants*,

v.

WILLIAM A. EGAN, Governor of the State of Alaska.

On Appeal From the District Court for the State of Alaska

BRIEF OPPOSING THE MOTION TO AFFIRM OR DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 327

ORGANIZED VILLAGE OF KAKE and ANGOON COMMUNITY ASSOCIATION, *Appellants,*

v.

WILLIAM A. EGAN, Governor of the State of Alaska.

On Appeal From the District Court for the State of Alaska

BRIEF OPPOSING THE MOTION TO AFFIRM OR DISMISS

OPINION BELOW

The opinion below (Juris. Stmt. p. 17) is now reported. 174 F. Supp. 500.

STATEMENT OF THE CASE

Appellants, Organized Village of Kake, and Angoon Community Association, are incorporated villages of Thlinget Indians, chartered under federal law (R. 6,

29). As such, they exercise fishing rights in Alaskan waters (R. 7, 30). With those rights appellee asserts the lawful authority to interfere pursuant to Alaskan state law. (R. 52, 54-55.)

Possessory rights of the natives in Alaska have been given protection by the Federal government at least since the proviso of Sec. 8 of the Act of May 17, 1884, 23 Stat. 24, 26 (quoted *post*, p. 13; see other statutes cited R. pp. 226-227). At the time of admission of the State of Alaska these rights found express protection in the following provision of the Statehood Act of July 7, 1958, 72 Stat. 339, Sec. 4 of which provided (quoted here to reflect an amendment resulting in striking the material bracketed and inserting the italicized matter, as a result of the Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, § 2):

> "Sec. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property [, belonging to the United States or which may belong to] *(including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for* said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the

> Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: . . ."

Appellants rely on the foregoing Sec. 4 to preclude the exercise of jurisdiction by the State over their fishing. (R. 11, 34.)

Concurrently a transitory federal jurisdiction, quite beyond that of Sec. 4, over fishing and wildlife generally (and which will terminate January 1, 1960), has been bruited in the case thus far. It arises from Sec. 6(e) of the Statehood Act (as amended by the Omnibus Act) which provided—

> "That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety [legislative] *calendar* days after the Secretary of the Interior certifies[1] to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: . . ."

The immediate question revolves about certain fishing properties purchased and owned by the United States in trust for appellants, including canneries, fish traps, and related works. (R. 7, 29.) Alaska has forbidden fish traps generally (Ordinance No. 3, quoted *post*, pp. 13-14), as did the Secretary of the Interior in deference to Alaska's views in the Secretary's regula-

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[1] The Secretary of the Interior certified April 27, 1959. Cong. Rec. April 28, 1959, p. 6169; *id.*, p. 6247, Exec. Comm. No. 903. As a result, the transitory general authority over fish and wildlife terminates January 1, 1960.

tions pursuant to § 6(e) above, for the year 1959—save as to Indian fish traps where the state had disclaimed jurisdiction pursuant to Sec. 4 (R. 8-9; 31-32).[2]

Notwithstanding the renunciation of jurisdiction by the state pursuant to Sec. 4, appellee threatened enforcement against appellants of a statute of Alaska abolishing fish traps (17 Session Laws of Alaska 1959, amended by 95 S.L.A. 1959, Juris. pp. 40, 41). This threat precluded appellants from determining through ordinary legal remedies their rights to freedom from state regulation of their fishing properties without incurring irreparable injury. (R. 10, 33, 12, 35.) Actual seizure of one of appellant Kake's traps was effected. (R. 14-15.)

Appellants sought an injunction against the interference with their federally recognized and protected fishing rights. Suit for injunction was brought in the District Court for the State of Alaska. A temporary

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[2] "The proposal to eliminate fish traps in the pending regulations was motivated by the desire of the Department to adjust its actions as quickly as possible to the desires of the Alaskans in regard to the control of their natural resources. The people of Alaska twice voted in referendum to abolish traps.

"As you know, under section 4 of the act of July 7, 1958 (72 Stat. 339) the State of Alaska disclaimed jurisdiction over any lands or other property, including fishing rights, held by any Indians, Eskimos, or Aleuts, or which is held by the United States in trust for them, and recognized continuing federal authority thereover. This disclaimer, coupled with the longstanding supervisory control exercised for the protection of the interests of Indians, Eskimos and Aleuts by the Department of the Interior, accounts for the provision that the proposed regulations will not eliminate operation of fish traps by Indian tribes or villages. The Secretary will continue to control the operation of traps by Indian tribes and villages." *Letter of March 10, 1959, Secretary of the Interior to Area Director, Juneau,* R. 229.

injunction was denied and the suit was dismissed, with an opinion of July 1, 1959 (Juris. pp. 19-29). While the court below recognized the outright collision between state and federal power (pp. 20-21), it held that the state owns the tidelands where the traps are to be installed as a result of the equal-footing doctrine; that "Indian fishing rights do not include the right to fish with forbidden gear or in a manner prohibited to other citizens of the state" (p. 22); that the equal-footing doctrine means that the state has acquired not only the tidelands but "local sovereignty" as well (pp. 22, 24); that the "State has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of the people" (p. 24).

Accordingly, the court sustained the validity and application of State Ordinance No. 3 (*post*, pp. 13-14), which abolished the use of fish traps (p. 27), holding that for the Secretary to authorize the fish traps by appellants "would seem to impair the equal footing standing of the new state" (p. 26). It concluded not only that the Secretary was without authority but "that the State of Alaska has authority to prohibit all fish traps in Alaska waters, including those of the plaintiffs, and plaintiffs are not entitled to the relief here sought." (p. 27.)

ARGUMENT

The Case Is Not Moot

The State, without jurisdiction over Indian fishing as a result of Sec. 4 of the Statehood Act, nevertheless asserts jurisdiction under a state Constitutional Ordinance No. 3 to prohibit the use of fish traps by appellants, and has actually seized one of appellant Kake's

traps (R. 14-15). Ignoring questions as to its own jurisdiction, it then pins its case for mootness on a supposed expiration of federal jurisdiction. In so doing, the State points to the expiration of a quite different provision of the Statehood Act, Sec. 6(e), which made the Federal Government a temporary fish-and-game department of the State until the new state could take over regulation of fish and wildlife generally. The State has provided for taking over these latter functions, as it might under Sec. 6(e), and they will be taken over January 1, 1960. Prospectively, then, the State says it is no longer possible for the Secretary of the Interior to regulate fish traps in Alaskan waters, and despite the existence of Sec. 4, denying state jurisdiction, that it is possible for Alaska to close up appellants' fishing.

The continued application by the State of its Ordinance No. 3 in plain defiance of the jurisdiction which it "forever disclaimed" in Sec. 4 of the Statehood Act manifestly would prevent the case from becoming moot, for the State has not recanted that assertion of jurisdiction and right. A plain undertaking by appellee that there will be no continued assertion of this right on the part of the State to close up the Indian fisheries might warrant serious consideration on some issue of mootness. The fact is that there is no expiration either of the State's Ordinance No. 3 or of Sec. 4 of the Statehood Act.

The State's argument of mootness is based on the fallacy of its pointing not to its own jurisdiction, which was called in question by the complainants (R. 11-12, 33, 34), but to the jurisdiction of the Secretary of the Interior acting as a tempory fish-and-game depart-

ment. True enough, the Secretary has long regulated commercial fishing in Alaska pursuant to the Act of June 6, 1924, 48 U.S.C. § 221 (Juris. Stmt. pp. 33-34); the regulations are familiar in the Code of Federal Regulations. (50 C.F.R. Subch. F, Alaska Commercial Fisheries, Pts. 101-130.) And true enough, with statehood, questions respecting continued regulation were raised, and, in the Statehood Act, dealt with. Section 6(e) of the Statehood Act provided for intermediate secretarial regulation, with assumption of the regulation by the new State when ready. And as a result of Sec. 6(e), the Secretary of the Interior made certain modifications in the regulations pursuant to "existing law"[3] noting (24 Fed. Reg. 2054; No. 54, Mar. 19, 1959) that "One of the most important issues raised by the proposal to amend these regulations is the issue presented by the proposal to prohibit, beginning in 1959, the use of fish traps in Alaskan waters, *except those operated by Indian tribes or villages in certain waters.*" The amended regulations prohibited fish traps (§ 102.10) except those operated by these appellants (and appellants in a companion case) covered by § 115.26 of the regulations (Juris. Stmt. pp. 39-40).

But it does not follow that this temporary provision is the "authority" (as the State calls it) for appellants' fishing rights. Those rights are recognized and respected and dealt with by federal statute in Sec. 4; the State has disclaimed *any* jurisdiction over those rights. The State can, then, accept transfer of the secretarial intermediate jurisdiction over everyone else in Alaska—and will take over January 1, 1960.

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[3] See *Ketchikan Packing Co.* v. *Seaton*, 267 F. 2d 660.

But under Sec. 4 it is powerless to take over to any extent a jurisdiction respecting appellants' fishing rights.

Accordingly, the argument amounts to no more than to say that because the Secretary has prospectively lost authority which he previously possessed to regulate broadly all commercial fishing in Alaska, he either could invest or has invested the State with jurisdiction in defiance of Sec. 4, or that the State is authorized to seize jurisdiction, or deprive appellants of their fishing rights because of some intermediate regulation addressed broadly to the Secretary's temporary fish-and-game-department duties notwithstanding the recognition which those regulations acknowledged were retained by appellants.

The Court Below Is the Highest Court of the State

Perhaps the mere fact that the respective parties are all agreed that the District Court for the State of Alaska is a state court and the highest court of the State in which the question could be raised is inconclusive, for the Circuit Justice considering the motion for a stay indicated that the Court might want development of that jurisdictional aspect through postponing the question of jurisdiction to the merits. (Opinion of Mr. Justice Brennan, July 11, 1959, p. 9.) Since in that event under the practice of the Court the parties would be alerted to a full development, we do not here do more than indicate that prior to filing the complaint in the court below, Alaska had become a state (72 Stat. 339) and all territorial vestiges whatever had been obliterated so that the court's status as a territorial court had ended (*Benner* v. *Porter,* 9 How. 235, 242-244); Alaska itself had accepted the District Court

as an interim court (Const., Art. XV, § 17) (quoted *post* p. 13); Congress had agreed in the Statehood Act, § 18, (quoted *post* p. 14) and the United States District Court had not yet been organized. The cumulative result is that it is impossible for the court below to be anything but a state court. We note also that no other court than that interim court existed as a state court at the time; and like the justice-of-the-peace court in *Grovey* v. *Townsend*, 295 U.S. 45, 46, it was the highest court of the state in which a decision could be had—thus placing it squarely within the jurisdiction of this Court.

The Federal Question Is Substantial

Notwithstanding the total disclaimer by Alaska of any right to regulate Indian fishing in Sec. 4 of the Statehood Act, the court below squarely held that the State did have "an absolute right to control and regulate the killing of game as its judgment deems best in the interest of the people" (Juris. Stmt. p. 24); that "The authority conferred upon the Secretary by existing law . . . should not be permitted to impair the powers or rights of the new state which come from the status of statehood. To do otherwise would seem to impair the equal footing standing of the new state." (*Id.*, pp, 25-26.) The court concludes (*id.*, p. 27) "that the State of Alaska has authority to prohibit all fish traps in Alaska waters, including those of the plaintiffs, and the plaintiffs are not entitled to the relief here sought."

Thus, notwithstanding that Congress said in the Statehood Act, Sec. 4, that Alaska should *not* have jurisdiction until Congress might later act, and notwithstanding that the State accepted that provision and disclaimed accordingly; and notwithstanding that

Congress has made no other move to invest the State with jurisdiction to do what federal statute has established it shall not, the Court below has overridden that clear federal statute because of an absolute right in the state, or because of the equal-footing doctrine. This is denial of validity of Sec. 4 under § 1257(1) of the Judicial Code. *United States* v. *Lynch*, 137 U.S. 280, 285.[4] Likewise, the court below sustains State Ordinance No. 3 (Juris. p. 25), as authorizing the invasion of appellants' fishing rights, thereby rejecting appellants' contentions based on the claim of federal right that the State Ordinance is invalid. This is affirmance of the validity of a state statute within the meaning of 1257(2) of the Judicial Code.

To reach the conclusion that either the federal or State statute is valid and effective clearly requires analysis and exposition; it is impossible to say that any settled principles already enunciated have foreclosed appellants' contentions where Congress has so plainly supported them. The questions are therefore substantial. Robertson & Kirkham, *Jurisdiction Sup. Ct. U.S.* § 58 (1951 ed.).

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[4] The case cited states the rule, "The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry." Note that here Alaska denies the constitutionality (because of the equal-footing doctrine) and the legality (because of state fish-and-game jurisdiction under Sec. 6(e)) of Sec. 4 of the Statehood Act, and in this the State was sustained by the court below. And note that appellants deny the constitutionality and the validity of State Ordinance No. 3, purporting to regulate appellants notwithstanding the express provisions of Sec. 4 of the Statehood Act. To the extent of appellants' fishing rights both statutes cannot subsist; either Sec. 4 of the Statehood Act, or State Ordinance No. 3, is invalid.

Conclusion

The motion to dismiss or affirm should be denied, and probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

(See Appendix to Jurisdictional Statement for other items)

Act of May 17, 1884, 23 Stat. 24, 26, Sec. 8

* * * * * * * * * *

Provided, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: * * *

* * * * * * * * * *

Constitution of the State of Alaska

Transfer of Court Jurisdiction

Section 17. Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law.

* * * * * * * * * *

Ordinance No. 3

Abolition of Fish Traps

Ballot

Section 1. Each elector who offers to vote upon the ratification of the constitution may, upon the same ballot, vote on a third proposition, which shall be as follows:

"Shall Ordinance Number Three of the Alaska Constitutional Convention, prohibiting the use of fish traps for the taking of — Yes ☐

salmon for commercial purposes in the coastal waters of the State, be adopted?" No ☐

Act of July 7, 1958, 72 Stat. 339, 350

• • • • • • • • • • •

SEC. 18. The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, shall not be effective until three years after the effective date of this Act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of the judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function as provided in this section.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 2

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE, a Federally Chartered Corporation,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees.*

On Appeal from the Supreme Court for the State of Alaska

BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 2

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE, a Federally Chartered Corporation,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees.*

On Appeal from the Supreme Court for the State of Alaska

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court for the State of Alaska, rendered June 2, 1961, is reported at 362 P. 2d 901. A copy of the opinion is contained in the separate Appendix to the Statement as to Jurisdiction, Nos.

2 & 3 O.T. 1961, filed jointly by the Metlakatla Indian Community, appellant in No. 2, and Organized Village of Kake and Angoon Community Association, appellants in No. 3. (Herein cited as "Opinion.")

The opinion of the transitional District Court for the State of Alaska, R. 59-66, is reported at 174 F. Supp. 500 (1959).

The opinion of this Court rendered in this case during the October Term 1959 is reported at 363 U.S. 555 (1960). The opinion of Mr. Justice Brennan, who, as Circuit Justice, granted appellant a preliminary injunction on July 11, 1959, is reported at 4 L. Ed. 2d 34, 80 S. Ct. 30 (1959).

JURISDICTION

The judgment of the Supreme Court of Alaska was entered on June 2, 1961, and a notice of appeal was filed in that Court on July 27, 1961. This Court noted probable jurisdiction on October 23, 1961.

The jurisdiction of this Court rests on 28 U.S.C. § 1257 (1), (2).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether the Alaska anti-fish trap law, 17 SLA 1959 and 95 SLA 1959, as applied to appellant's fishing in an exclusive Federal Reserve, is repugnant to the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358, to Presidential Proclamation No. 1332, 39 Stat. 1777, as ratified by the Act of May 7, 1934, 48 Stat. 667, to Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1958) and to regulations of the Secretary of the In-

terior issued thereunder, 25 C.F.R. Part 88, all of which authorize appellant to fish in the Metlakatla Reserve subject only to Federal control, and whether the Alaska Statute, therefore, violates the Supremacy Clause of the United States Constitution.

2. Whether the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332 are invalid because they were repealed by implication by the Alaska Statehood Act.

3. Whether the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332, if they were not repealed, are unconstitutional in that they are beyond the powers of the Federal Government to enact and proclaim, respectively, and whether this Court erred when it upheld the Act of 1891 and the Presidential Proclamation in *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918).

4. Whether Section 4 of the Alaska Statehood Act, which provides that Indian trust property, including fishing rights, in Alaska, "shall be and remain under the absolute jurisdiction and control of the United States," is unconstitutional in that it violates the Equal Footing Doctrine.

5. Whether Section 4 of the Alaska Statehood Act and the Alaska Omnibus Act, 73 Stat. 141, if construed as reaffirming the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332, are invalid because they have not received the express consent of the State of Alaska.

STATUTES INVOLVED

The statutes, Presidential Proclamation, and regulations involved are lengthy, and are set forth in Ap-

pendix A of this brief. Included therein are the pertinent portions of:

1. Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358.
2. Presidential Proclamation of April 28, 1916, 39 Stat. 1777.
3. Act of May 7, 1934, 48 Stat. 667.
4. Alaska Statehood Act, Sec. 4, 72 Stat. 339 (1958).
5. Alaska Statehood Act, Sec. 8(b), 72 Stat. 343-344 (1958).
6. Alaska Omnibus Act, Sec. 2(a), 73 Stat. 141 (1959).
7. Constitution of Alaska, Article XII, Section 12.
8. Constitution of Alaska, Article XII, Section 13.
9. Alaska Anti-Fish Trip Act, Chapter 17, Session Laws of Alaska, February 25, 1959, as amended, Chapter 95, Session Laws of Alaska, April 17, 1959.
10. Regulations of the Bureau of Indian Affairs, Department of the Interior, 25 C.F.R. Pt. 88 (1961 Supp.)

STATEMENT

This suit arose out of an attempt by the newly-created State of Alaska to enter a Federally-created exclusive Indian fishery reserve for the purpose of regulating the fishing rights of appellant, Metlakatla Indian Community, an Indian tribe located on the Annette Islands Reserve in Southeastern Alaska.

On March 7, 1959 the United States Department of the Interior issued regulations (see 24 Fed. Reg. 2053) *inter alia* authorizing appellant to operate during the 1959 fishing season four fish traps, located within the

Metlakatla fishery reserve, an area of about 56½ square miles.[1] These regulations merely reaffirmed a practice which had existed for many years prior to 1959. R. 6.

The State of Alaska denounced the Federal regulations as void and illegal and warned appellant that a state law which had made the operation of fish traps a crime would be applied against them. R. 13, 32-33. Appellant thereupon brought this action in the interim District Court for the State of Alaska to enjoin State officials from enforcing the anti-fish trap law within the waters of its Federally-protected and Federally-regulated reservation. The appellees moved to dismiss the complaint, R. 40, and their motion was granted. R. 69.

Since the Alaska Supreme Court had not as yet been organized when the District Court rendered its judgment, a direct appeal was taken to this Court. R. 79. Upon appellant's application, Mr. Justice Brennan entered a stay which permitted fishing during the 1959 season and thereafter

> pending . . . disposition by this Court of said petitions . . . as [appellants] have been authorized by the Secretary of the Interior of the United States pursuant to his Regulations of March 7, 1959, 24 Fed. Reg. 2053, or as [appellants] may from time to time be authorized by him.

After the appeal had been docketed in this Court but before it had been heard, the new Supreme Court

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[1] The size of appellant's water reservation was calculated for the appellees by Mr. Miro Mihelich, a civil engineer. His affidavit is appended to appellees' brief before the Supreme Court of Alaska.

for the State of Alaska was created. Out of an abundance of caution, appellant then filed a second appeal from the judgment of the District Court, this time with the Supreme Court of Alaska.

After hearing this case at the October Term 1959, this Court determined that it had jurisdiction, but concluded that it would "refrain at this stage from deciding the merits of this appeal so as to afford the Alaska Supreme Court the opportunity to rule on questions open to it for decision." 363 U.S. at 562. It pointed out that the Alaska Court could hold as a matter of State law that the fish trap statute did not apply to Metlakatla Indian fishing, thus ending the litigation without raising a Federal question. Accordingly, the Court held the appeal from the District Court on its docket, continued the preliminary stay in effect, and directed the parties to seek a determination of the appeal pending in the Alaska Supreme Court.

Appellant thereupon prosecuted its appeal in the State Supreme Court. That Court affirmed the judgment below. It held that the State statute did apply to Indian fishing and that the Federal statutes, proclamation, and regulations on which appellant's claim of right rested were void and of no effect.

While this litigation was pending, on June 2, 1960, the United States Department of the Interior issued new Alaska fishing regulations, 25 Fed. Reg. 4865, replacing those promulgated in 1959. The only significant change in these regulations as far as appellant is concerned, is that, while the earlier regulations applied to one fishing season only, the new regulations are of indefinite duration. 25 C.F.R. § 88.8 (1961 Supp.).

SUMMARY OF ARGUMENT

Appellant contends that the attempt by the State of Alaska to prohibit trap fishing within its reservation is in direct and total conflict with acts of Congress, a proclamation and regulations of the Executive branch and two decisions by this Court.

Federal concern for the Metlakatlans—whose ancestors were known as "people of the fish traps"—began in 1887 when this group of Indians settled on the Annette Islands in Alaska at the express invitation of officials of the United States Government. In 1891, Congress approved the action theretofore taken by the Executive branch by making the land and waters of the Annette Islands a statutory Indian reservation. The boundaries of the water reserve were clearly defined by a Presidential Proclamation issued in 1916 and the reservations theretofore made were reaffirmed by Congress in 1934. During this 70-year period, the Metlakatla water reservation has been twice sustained by this Court.

With the financial and technical support of the Bureau of Indian Affairs, the Metlakatla Indian Community has been able to accumulate the capital necessary to construct and maintain several fish traps and a cooperatively-owned cannery. These investments continue to be the economic backbone of the community. Traps permit the more efficient and economical capture of salmon than is the case with mobile gear. The cannery provides much needed employment and, in good years, a profit for investment in community health and welfare projects and public works. Without traps, however, the cannery and thus the economic life of the community would collapse. For this and other reasons

Congress and the Executive branch have not terminated or diluted their role as guardians and protectors of this Indian community. Rather, they have expressly authorized appellant to continue its accustomed methods of fishing.

At the time Alaskan statehood was being considered, Congress was greatly concerned that Indian and native rights, including fishing rights, might be impaired by statehood. Although the law is clear that existing Indian rights could not be abridged by silence or by implication, Congress, out of an abundance of caution, wrote its concern into Section 4 of the Statehood Act by reserving Indian fishing rights to the "exclusive jurisdiction and control of the United States."

Notwithstanding this uninterrupted course of Federal concern for the economic welfare of the appellant, the Alaska Supreme Court has concluded that the Metlakatla fishing reservation has been extinguished. Yet it has not been able to point to any Congressional action on which this conclusion of law can be based. Moreover, nothing contained in the record or in the opinion of the courts below offers any possible justification of a social or economic nature for the State's invasion of Metlakatla's rights. The only grounds for such interference are emotional and political, which can never justify a State's denial of a Federal right. *Cooper* v. *Aaron,* 358 U.S. 1 (1958).

Even if social or economic arguments had been advanced in support of the exercise of the State's police powers, they would not have been relevant to the legal issues in this case because control of fishing within appellant's reservation has been preempted by the Federal Government. The exercise of State police power

in such manner as to destroy Metlakatla's fishing rights, which rights (1) were established and have been repeatedly confirmed by Congress, the President and this Court, (2) have been expressly preserved from State regulation and control by the Act of Congress admitting Alaska into the Union, and (3) have continued in existence to the present day with the consent and encouragement, and under the express regulations of the Secretary of the Interior.

In its first opinion in this case, this Court decided that even though it had jurisdiction, it would give the newly-created Alaska Supreme Court, which had not as yet spoken on the matter, an opportunity to pass on the merits of the case. It did so because (1) if the State Court decided for appellant on State grounds "a constitutional question now appearing on the horizon might disappear," 363 U.S. at 562, and (2) if it decided for appellees it could assist this Court by furnishing enlightenment on "local economic and social considerations pertinent to the scope of the so-called police power", Id. at 561, which might possibly serve as justification for the State legislation.

The Supreme Court of the State of Alaska has now spoken. As it decided in favor of the assertion of State power, the constitutional question is once again before this Court. But the enlightenment which this Court requested has not been offered. The substantive record for this second appeal has not been enlarged. It is identical with the substantive record in the first appeal. Moreover, the State Court's 76-page opinion is almost exclusively devoted to legal discussion. The few, isolated observations on economic conditions contained in the opinion are (a) not founded on any rec-

ord, (b) not pertinent to the exercise of the police powers, (c) in parts misleading and incomplete.

As this case returns to the Supreme Court of the United States, the questions before it two years ago have been substantially broadened by the wide sweep of the decision rendered by the Supreme Court for the State of Alaska. In its opinion, the State Court found three Federal statutes, a Presidential proclamation, and a set of regulations of the Secretary of the Interior invalid and, in its holdings, in effect took issue with contrary holdings by this Court. The implications of the Alaska Court's decision are, in fact, so far-reaching that they challenge not only Metlakatla's fishing rights, but also the Community's possession of its very home, the upland of the Annette Islands.

There is one further element of confusion in the Alaska Supreme Court's opinion to which appellant wishes to draw the Court's attention. The claim of legal rights asserted by appellant Metlakatla is clearly distinct from the claim asserted by appellants Kake and Angoon in the companion case. Nevertheless, throughout this litigation appellees, as well as the Alaska courts, have failed to state with exactitude which arguments and holdings, respectively, apply to each case.[2] The resulting lack of specificity, intertwined with dark hints of Indian claims extending to all of Alaska's waters, has clearly been detrimental to appellants in both cases. In this brief, we wish to make clear again,

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[2] The Alaska Supreme Court observed at one point:

> Although *most* of the foregoing opinion applies to Metlakatla as well as to Kake and Angoon, certain additional facts require a separate discussion of Metlakatla's claims. (Emphasis supplied.) [Opinion, p. 54a.]

that the Metlakatla Indian Community claims the right to fish with traps only within the boundaries of its Federal reservation—in an area of 56½ square miles, less than 1% of the total water mass of Southeastern Alaska[3] and an infinitesimal fraction of the total Alaskan water mass.

Appellant wishes to stress the limited character of the right claimed by it because of a most serious misunderstanding contained in the Alaska Supreme Court's opinion. The Court states:

> The absolute jurisdiction claimed to be reserved in the United States is the right to regulate and control all fishing by Indians anywhere in Alaska. There are natives in all parts of Alaska. Approximately 42 per cent of the fishing population reported in the 1950 census were natives. If the full scope of the claimed power were eventually exercised by the Secretary of the Interior, only permanent chaos and conflict could result. The magnitude of the power claimed is such that the effect could be to render useless or futile any effort by the state to regulate. [Opinion, p. 27a.]

The fact of the matter is that while Metlakatlans fish in many parts of Alaska, both outside and within their reservation, they have never questioned the power of the State to regulate their fishing once they leave the reservation waters. It is only within the aforementioned 56½ square miles that an exemption from State control has been claimed. That the Court did not recognize this is difficult to understand in view of appellant's repeated explanation of the geographic limits

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[3] The total water mass of the Southeastern Alaska Panhandle measures 7,500 to 8,000 square miles, more or less. R. 74.

of its claim in the complaint, R. 9-10, 16, as well as in the briefs and during oral argument before the Alaska Supreme Court.

II. FACTUAL BACKGROUND OF THIS DISPUTE

During oral argument at the October Term 1959 hearing in this case Mr. Justice Frankfurter observed that he wished that counsel had put more flesh on the legal bones of this case, so that the Court would have a better understanding of the underlying reasons for this controversy. This thought was also reflected in the suggestion contained in this Court's opinion that if the Alaska Supreme Court decided for the State it could assist this Court by furnishing enlightenment on "local economic and social considerations pertinent to the scope of the so-called police power", 363 U.S. at 561. Such information, it was thought, might serve to justify the action of the Alaska legislature.

1. The Legal Relevance of Socio-economic Data

As already indicated, the record has not been enlarged to supply further evidence on social and economic conditions tending to support the State's position. Consequently, the only evidence before the Court on socio-economic questions is that contained in the affidavits submitted in the trial court by the appellant. R. 21, 32, 37.[4] But even if the record contained information tending to support the attempted exertion of Alaska's police power within appellant's reservation,

[4] Appellees submitted ten affidavits. Six attempt to prove that appellant's alleged injury is speculative since the fish formerly caught by traps might be caught by mobile gear. R. 41-42, 51-53. The other four are the affidavits of a police officer, R. 70-71, two geologists, R. 72-74, and one historian, R. 75-76. None of them contain information relevant to the social and economic conditions which might have led the Alaska legislature to outlaw trap fishing.

such information could not be given weight under the circumstances of this case.

From the early days of the Republic this Court has frequently held that a State may exercise its police powers to regulate a field which the Constitution reserves to Congress, providing, (1) Congress has not acted so as to "occupy the field", (2) the State's regulations do not substantially burden or interfere with national interests as reflected in the Constitution itself, and (3) the State can demonstrate a legitimate local interest in such regulation. The most recent reaffirmation of this doctrine is *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960). In applying those general principles, it has often been necessary to balance the depth and intensity of the local interest against the degree of interference with the Federal interest. The interstate commerce cases, for example, have required a judgment of whether the State's interest in highway safety is sufficiently acute to outweigh the nation's interest in an uninterrupted flow of commerce. Depending upon the particular facts of the case, the balance has been struck both for and against State regulation. Compare *South Carolina State Highway Department* v. *Barnwell Bros.,* 303 U.S. 177 (1938) with *So. Pacific R.R.* v. *Arizona,* 325 U.S. 761 (1945), and *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1960). This balancing of State and Federal interests requires, of course, socio-economic information concerning the State's justification for its attempted regulation.

Appellant respectfully submits, however, that the instant case is not of the foregoing type. Congress *has* acted to occupy the field. In 1891 it provided that the Metlakatla Community may use its reservation "under such rules and regulations, and subject to such

restrictions, as may be prescribed from time to time by the Secretary of the Interior." 26 Stat. 1101, 48 U.S.C. § 358. And in granting statehood to Alaska in 1958, Congress most emphatically declared that Indian fishing rights in the new state "shall be and remain under the absolute jurisdiction and control of the United States." Alaska Statehood Act, Sec. 4, 72 Stat. 339 (1958): Moreover, the State's attempted regulation is not a peripheral intrusion or tangential regulation of a matter of Federal interest. The State's efforts to abolish appellant's traps go to the very heart of the Federal concern for the appellant. The record is uncontradicted that if appellant were deprived of traps it would "wither and die". R. 21. This result would be in diametric conflict with the repeated Federal concern for the economic welfare of the appellant. In such circumstances, appellant submits that State law must yield, regardless of the economic or social justifications which might be offered.

This Court has unswervingly held that "[t]he United States may perform its functions without conforming to the police regulations of a state." *Arizona* v. *California*, 283 U.S. 423, 451 (1931) citing, *inter alia*, *Hunt* v. *United States*, 278 U.S. 96 (1928). The latter case involved an attempt by the State of Arizona to enforce its game laws within a national forest and game reserve. In order to reduce overgrazing, the Secretary of Agriculture had authorized the killing of large numbers of deer on federal land. Arizona proceeded to arrest three hunters. This Court upheld an injunction against the State's attempted enforcement of its game laws, saying:

> [T]he power of the United States to thus protect its lands and property does not admit of doubt

> [citations omitted], the game laws or any other statute of the state to the contrary notwithstanding. [278 U.S. at 100.]

In the field of Indian affairs, the power of Congress has long been recognized as "[p]lenary," *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565 (1903), and as "paramount and of a most sweeping character." *People ex rel. Ray* v. *Martin,* 294 N.Y. 61, 60 N.E. 2d 541, 545 (1945), *aff'd* 326 U.S. 496 (1946). The limitation on the power of states to enforce their criminal laws in the Indian country has been recognized in a long line of cases from *Worcester* v. *Georgia,* 6 Pet. (31 U.S.) 515 (1832), to *Williams* v. *Lee,* 358 U.S. 217 (1959). As this Court said in the latter case:

> [W]hen Congress has wished the States to exercise—power [over Indians] it has expressly granted them the jurisdiction which *Worcester* v. *Georgia* had denied. [*Id.* at 221.]

No such grant of jurisdiction has been made in the instant case.

2. Alaska's Antipathy to Fish Traps

While the Court would thus be able to proceed, without further ado, to a consideration of the questions of law in this case, appellant desires to comply with the Court's request for background information. Such information is offered merely to inform the Court of the political dispute out of which the present legal controversy has grown.

At this stage in history, Alaskan opposition to the eleven fish traps which remain of the more than 700 which once were in operation is based on emotion rather than on rational considerations of an economic or social

nature. The opposition is based on views and attitudes which were formed prior to Alaska's accession to Statehood, when fish traps were first and foremost *symbols of the colonial exploitation of Alaska by "Stateside" fishing and canning interests.* This view of the fish trap was most vividly expressed by Governor, now Senator, Ernest Gruening, in his Keynote Address to the Alaska Constitutional Convention, delivered on November 5, 1955:

> The people of Alaska have repeatedly and unchangingly manifested their overwhelming opposition to fish traps. It isn't necessary to rehearse all their reasons—the results have amply justified the Alaskans' position. But fish trap beneficiaries, residents of the mother country, want to retain their Alaska traps. So the traps are retained. And it is the power and authority of the federal government which retains them. In a clear-cut issue between the few, profiting, non-colonial Americans and the many, seriously damaged, colonial Alaskans, the state-side interest wins hands down. And it wins because the government, which is also supposed to be *our* government, throws its full weight on their side and against us.[5] [GRUENING, LET US END AMERICAN COLONIALISM 20 (1955).]

Alaska's resistance to the fish trap, as exemplified by Senator Gruening's remarks, was basically resistance on the part of local fishermen to automation and, more

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[5] Alaska was apparently unique among the organized Territories in having control of its fisheries vested in Washington rather than the territorial legislature. See testimony of Mastin G. White, Solicitor, Department of the Interior, in *Joint Hearings on S. 1446 and H.R. 3859 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce and Subcommittee of the House Committee on Merchant Marine and Fisheries,* 80th Cong., 2d Sess. 11 (1947). See also testimony of W. C. Arnold, Id. at 61-63.

particularly, and especially, to automation under non-resident auspices. Many of Alaska's residents were fishermen, with limited financial resources. Fish traps, which cost from $10,000 to $20,000 each year to acquire and install, were beyond their means. Testimony of Warner W. Gardner, Assistant Secretary of the Interior, in *Hearings on S. 1446 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 80th Cong., 2d Sess. 7 (1947). As the Court below correctly states: "The cost of construction and operation [of a fish trap] excluded the average Alaska fisherman from its use and in time the operation of fish traps became generally concentrated in the cannery owners and operators". Opinion, p. 7a.

Yet once the investment in a fish trap is made, the cost of operation is minimal. It needs neither the labor nor the fuel which a seine boat requires. "The labor costs of operating a trap are quite small; only two watchmen are needed and by and large with a reasonable salmon run, the salmon trap is substantially cheaper than seine fishing, so far as the price per salmon caught is concerned." Testimony of Assistant Secretary Gardner, *op. cit. supra* at 7.

We are thus faced here with the familiar struggle of man against machine. What accentuated the struggle was that man was the voteless, frustrated, and often very poor Alaska resident, while most of the machines were owned by large corporate interests controlled by non-residents. As aggressive, insufficiently regulated fishing *by all types of gear* depleted Alaska's

fish resources,[6] the residents, fishermen and non-fishermen, became increasingly bitter against the industry which, in their view, exploited the Territory's economic resource for the benefit of non-residents, while making no contribution whatever to the local economy. Even the seasonal labor to operate the fish traps and the company-owned canneries was imported on a short-term basis from "the States". The late Senator Richard L. Neuberger pointed out that in 1946 the canneries paid almost two-thirds of their total wage bill to non-residents. These workers were generally "boated northward from 'the States', and do not receive pay until the boats dock again in Seattle. Thus Alaska does not even get their chewing gum and cigarette business." *Survey Graphic Magazine,* February, 1948, reprinted in LIBERATE ALASKA FROM THE FISH TRAP 60 (1948).

To the embittered Alaska fishermen, the large canning company and its favorite gear, the fish trap, became a single concept. As one observer put it, "The fish trap, therefore, is looked upon by most Alaskans as the dipper with which the large absentee owner appeared to skim with relative ease the cream of one of the Region's most valuable resources, and then carried away to the Outside the fullest part of the wealth so garnered." ROGERS, ALASKA IN TRANSITION 11 (1960).

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[6] Even in their heyday the fish traps accounted for only one half of the total salmon catch. Tables submitted by Seton H. Thompson, Chief, Branch of Alaska Fisheries of the Department of the Interior in *Hearings on H.R. 1515 before the Subcommittee on Alaskan Problems of the House Committee on Merchant Marine and Fisheries,* 81st Cong., 1st Sess. 28 (1949).

Upon Alaska's accession to Statehood, the fish trap, the symbol of colonial exploitation, was abolished. Most of the more than 400 traps which were still in operation in 1958, were closed down. All that remained were 11 Indian-owned traps which the Secretary of the Interior expressly permitted to operate. Four of these traps belong to Metlakatla.

The closing down of 97% of the fish traps which operated in 1958 has eliminated the trap as a serious economic threat to the Alaska fishermen. In recent years the appellant's traps caught only the following percentage of the total catch:

Year	Alaska Salmon Pack Total[7]	Metlakatla Trap Caught Salmon Pack[8]	Percent (%)
	(Standard 48-pound cases)		
1955	2,457,969	5,793	.23
1956	2,950,354	13,845	.47
1957	2,441,894	8,308	.34
1958	2,984,371	25,763	.80
1959	1,770,795	13,332	.75
1960	2,549,545	3,249	.12

What is equally significant is that the anti-colonial argument simply does not and never did apply to Metlakatla. The Community's traps have served as a foundation which has enabled the Community to operate a successful cannery. R. 21, 36. *Both the traps and the cannery are owned by the Metlakatla Indian Community.* No non-resident's interest is here involved. (In fact, the Metlakatlans, whose forebears

[7] Pacific Fisherman Yearbook, p. 94 (Jan. 25, 1959), and information obtained from United States Fish and Wildlife Service.

[8] R. 33 and information obtained from United States Fish and Wildlife Service.

have been known as "People-of-the-salmon-traps", have been residents of Alaska and users of fish traps longer than many of the fishermen who called for their abolition in the name of anti-colonialism.) The employees at the cannery are Alaskans. The cannery's payroll is disbursed and spent in Alaska. Moreover, the profits of the canning operation, rather than being skimmed off the Alaskan economy as was the case elsewhere, are spent in Alaska on public improvement projects.

There remains one other contention which has occasionally been advanced: that fish traps are harmful from a conservation point of view. The makeweight character of this argument is explained in the following authoritative statement contained in a legislative report by the Department of the Interior:

> Various arguments have been urged in favor of eliminating the traps, not all of which have equal validity. For example, it is sometimes argued that the traps should be abolished as a conservation measure. Years of experience give no support to this argument. The basic conservation problem is one of permitting escapement of sufficient salmon to maintain the runs in succeeding years. That can be done as easily through regulating the traps as through regulating other types of gear.
>
> It is the economic arguments in favor of abolishing the traps which are decisive. Traps are a form of fishing equipment which require capital outlays beyond the capacity of most individual fishermen to finance. Salmon are also caught in Alaska with purse seines, beach seines, gill nets, troll lines, and other types of gear. These are commonly owned by individual fishermen conducting small-scale operations. [Letter of Douglas

McKay, Secretary of the Interior, to Herbert C. Bonner, Chairman, House Committee on Merchant Marine and Fisheries, printed as Appendix B to Brief for Appellant, No. 326, October Term 1959.]

In the view of the United States Fish & Wildlife Service, the sole conservation question is one of adequate escapement of fish to permit spawning and sustained reproduction. The conservation evil is overfishing whether by traps or nets or a combination of the two. The Secretary's regulations, under which appellants now fish, preclude overfishing by the Community. Only four of its eight potential sites are authorized for trap fishing. 25 C.F.R. 88.2(e) (Supp. 1961) In addition the regulations incorporate by reference Alaska's conservation regulations. Appellant's traps can fish only during those periods in which mobile gear can operate in the area surrounding the Metlakatla reservation. 25 C.F.R. 88.2(d) (Supp. 1961)

The economic and social arguments advanced by opponents of fish traps, though not contained in the record, have thus been shown to be wholly inapplicable to the situation now before this Court. By contrast, the record does contain evidence pointing to the significant social and economic benefits derived by the Metlakatla Indian Community from the traps and the cannery which they support. These benefits take the form of (1) employment of members of the Community in the cannery, R. 32, and (2) utilization of the profits of the cannery by the Community for public works and other services of community improvement, R. 21, which provide employment for fishermen in the off-season and help make Metlakatla an attractive, forward-looking Community, R. 32.

To the average individual fisherman, fishing provides seasonal employment at a level of income which makes it difficult to sustain a family year-round. The payroll at the cannery as well as the cannery profit ploughed back through off-season employment have given the Metlakatla Community the economic and social stability which it would never be able to achieve were it to depend on employment and income from fishing alone. In fact, few fishing and canning operations in Alaska are organized as sensibly as the one which the State of Alaska here seeks to destroy for emotional and political reasons.

III. APPELLANT'S FISHING RIGHTS WERE CREATED BY CONGRESS AND HAVE BEEN CONTINUALLY REAFFIRMED BY CONGRESS, THE EXECUTIVE AND THIS COURT DOWN TO THE PRESENT DAY

A. The 1891 Act Created Appellant's Fishing Rights

The four fish traps which appellant and the United States seek to protect against the State's effort to outlaw their operation are located within the exclusive fishery which is part of the Metlakatla Indian Reservation. That Reservation was established for the Metlakatla Community under the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358. The Act provides:

> Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans, who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be pre-

scribed from time to time by the Secretary of the Interior.

When the Metlakatla Reservation was established in 1891, the Territory's sparse population and its limited significance to commercial interests evidently made it unnecessary to define by metes and bounds the limits of the Community's fishing rights. In the early decades of this century, however, West Coast fishing and canning companies became increasingly active in exploiting Alaska's natural bounty and began to interfere with fishing by the Metlakatlans in their own homeland. This caused President Wilson in 1916 to issue a proclamation which defined the Metlakatla fishery reserve in the following terms:

> Whereas the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and
>
> Whereas it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery,
>
> Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of said islands, rocks, and islets, are hereby reserved

for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned. [39 Stat. 1777.]

The 1916 Proclamation was given statutory recognition in 1934 when Congress declared the Metlakatlans to be citizens of the United States. The Act of May 7, 1934, 48 Stat. 667, provides:

(c) The granting of citizenship to the Indians described in Section 3(b) of this title shall not in any manner affect the rights, individual or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakahtla Colony. Any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to modification, alteration, or repeal by the Congress or the President, respectively.

B. Metlakatla's Fishing Rights Have Been Affirmed By This Court

Since its creation in 1891, this Court has had two occasions to consider the validity of Metlakatla's exclusive water reservation. In the first case, it affirmed them expressly. On the second occasion it made use of the principle previously established to sustain the exclusive fishery of another Indian community.

Express affirmation of Metlakatla's fishing rights as well as an authoritative analysis of the origins of the Community are to be found in *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918). That case was a suit brought by the United States on behalf of Metlakatla to exclude a commercial canning company from erecting traps in the waters immediately adjacent to the Annette Islands. Upholding the Government's contention that these waters were exclusively reserved for the use of Metlakatla, this Court said:

> The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this, the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation . . . Evidently Congress intended to conform its action to their situation and needs. It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands. This, as we think, shows that the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland,—in other words, as descriptive of the area comprising the islands. [248 U.S. at 89.]

Throughout this litigation, the State of Alaska has emphasized that the *Alaska Pacific Fisheries* opinion fails to make express mention of the 1916 Presidential proclamation. The court below, too, states that this Court "ignored" the Presidential proclamation. Opinion, p. 57a. Appellee and the State Court have overlooked, however, the last and most decisive words in the *Alaska Pacific Fisheries* opinion which are "Decree"

affirmed". The decree in question "ordered that the defendant Alaska Pacific Fisheries vacate the lands and waters mentioned *in the proclamation of the President of the United States on April 28, 1916. . . .*" (Emphasis supplied.) *Alaska Pacific Fisheries* v. *United States,* 240 Fed. 274, 275-6 (9th Cir. 1917).[8]

The second case in which this Court has had occasion to consider appellant's fishery reserve is *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86 (1949). There the Court sustained the validity of another water reserve, namely that established by the Secretary of the Interior for the Karluk Indians of Alaska. One of the Court's principal reasons for concluding "that the Secretary of the Interior was authorized to include the [surrounding] waters in the [Karluk] reservation",[9] *Id.* at 116, was the principle established in *Alaska Pacific Fisheries* v. *U. S., supra,* namely, that an exclusive water reservation surrounding a land reservation is essential for the welfare of the Alaska Indian people and must, therefore, be held an integral part of the total reservation. *Id.* at 114.

C. The Alaska Statehood Act Expressly Preserved Appellant's Fishing Rights

Throughout the course of this litigation neither appellees nor the State courts which have considered the matter have pointed to any statute which repealed, amended, or otherwise modified the rights granted under the 1891 Act. At best they have hinted at repeal

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[8] As previously mentioned, Congress ratified the 1916 Presidential proclamation in 1934.

[9] The Court then went on to decide that while the Karluk reservation was validly established, the criminal sanctions of the White Act could not be used to protect it.

or amendment by implication. Yet it is an established canon of statutory construction that an earlier specific statute is not repealed by implication by a subsequent general statute. Ex parte *Crow Dog,* 109 U.S. 556, 570-71 (1883). Until explicitly repealed or amended, the Act of 1891 must be accorded the force and effect it had upon enactment. Had Congress chosen to terminate appellant's Federally-protected fishing rights at the time Alaska became a State it could undoubtedly have done so. But absent Congressional action, this Court would surely not allow Indian rights to be destroyed. Cf. *Williams* v. *Lee,* 358 U.S. 217 (1959).

In the instant case, far from having any basis for finding a sub-silentio repeal of the Metlakatlans' fishing rights, we have an express Congressional reaffirmation of existing Indian fishing rights. Throughout the ten years of legislative activity on the Alaska statehood issue, Congress never deviated from its firm intention to retain absolute jurisdiction over Indian fishing rights and preserve them from State control. This Congressional will was given explicit expression in Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1958), as amended, 73 Stat. 141 (1959), which provides:

> As a compact with the United States said State and its people do agree and declare *that they forever disclaim all right and title . . . to any lands or other property (including fishing rights),* the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, *shall be and remain*

> *under the absolute jurisdiction and control of the United States* until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe . . . (Emphasis supplied.)

Congress could hardly have chosen other words to make it plainer that, as a condition of statehood, Alaska and its people must disclaim *all* interest in Indian property, expressly including "fishing rights", and that as a result of this disclaimer "absolute jurisdiction and control" over "such" property (including fishing rights) is to "be and remain in the United States." The clarity of Section 4 should make unnecessary any further examination of the legislative history. *United States* v. *Missouri Pac. R.R.*, 278 U.S. 269, 277-78 (1929).

An examination of the legislative history of a decade of Alaska statehood bills would, however, merely reinforce what is readily apparent in the language of Section 4: all control over Indian fishing was to "be and remain" solely in the United States. To avoid burdening the brief with a lengthy recital of legislative history, we refer the Court to the Appendix to appellant's brief in No. 326, October Term 1959. It is sufficient for present purposes to point to the statement of the first committee to report out an Alaska Statehood bill to either house of Congress:

> *The basic intent* of paragraph Second, Section 3, insofar as it deals with matters affecting the Indians, Aleuts, and Eskimos, *is to protect the natives of Alaska against the possibility of infringement of their property rights by the proposed new state,* and to maintain unimpaired the authority of the Congress over the use and disposition of native property in Alaska. Provisions to this effect are

> a customary feature of enabling acts admitting new States to the Union. [H.R. REP. No. 1731, 80th Cong., 2d Sess. 31 (1948).] (Emphasis supplied.)

Congress never deviated from this original "basic intent" to protect Indian property rights "against the possibility of [State] infringement." In fact, it strengthened its initial resolve by adding to Section 4 the parenthetical phrase "(including fishing rights)," to make clear that Indian property rights included fishing rights. The Senate Committee which added that parenthetical phrase stated in its report:

> The bill [H.R. 331, 81st Cong.] provides the machinery for accomplishment of [Alaska's admission] by—
>
> . . .
>
> (5) Providing . . . for transfer to the State of the highly important Alaskan fisheries and wildlife, *except those which* are subject to international agreement or *are included within the reserved native rights.* (S. REP. No. 1929, 81st Cong., 2d Sess. 1-2 (1950) (Emphasis supplied.)

The language and history of Section 4 of the Alaska Statehood Act thus demonstrate a firm Congressional resolve to maintain the *status quo* prior to statehood with respect to Indian fishing rights. Indeed appellees have conceded as much.[10] Having so conceded, they cannot prevail, for they cannot escape the fact that, as far as Metlakatla is concerned, the status quo prior to statehood was the Community's unassailable right to

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[10] In their brief to this Court in the first hearing of this case, appellees stated: "Clearly, the intent of Congress was to maintain the *status quo.*" Brief for Appellees, Nos. 326, 327 October Term 1959, p. 31.

fish in reservation waters, subject only "to such rules and regulations as the Secretary of the Interior shall provide."

D. Executive Regulations Confirm Appellant's Right to Fish With Traps

The Executive branch has long authorized and even encouraged[11] appellant to fish in its reservation waters by means of traps. Indeed, it was almost fifty years ago that the Secretary of the Interior first specifically authorized appellant's trap fishing, by ordering on February 11, 1915:

> That, until otherwise ordered by the Secretary of the Interior, natives or associations of natives of Metlakatla who have secured the approval of the Council of the Annette Islands reserve be given permits by the Secretary of the Interior to erect salmon traps on the shores of Annette Islands. R. 6.

From that date forward, the Secretary has continually authorized trap fishing in the waters surrounding the Annette Islands, and appellant has so fished.

The current regulations were issued to implement Section 4 of the Statehood Act, which specifically reserves to the United States "absolute jurisdiction and control" over Indian "property (including fishing rights)." Those regulations state: "Salmon trap fishing is permitted". 25 C.F.R. § 88.2(d). Thus the regulations, though limiting the number of fish traps which appellant can operate, confirm that those traps which are authorized may operate lawfully.

If there were any doubt of the Secretary's authority to promulgate those regulations, it must be dispelled

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[11] See, *e.g.*, R. 31, 34.

by the familiar rules that "[a]n administrative order is presumptively valid," *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949), and that the Secretary's interpretation of his statutory authority is entitled to "considerable weight", *Ketchikan Packing Co.* v. *Seaton*, 267 F. 2d 660, 663 (D.C. Cir. 1959), especially where it is contemporaneous with the statute under which it is promulgated, see *Mazer* v. *Stein*, 347 U.S. 201, 213 (1954), *Great Northern R.R.* v. *United States*, 315 U.S. 262, 275 (1942), and where he played an important role in its drafting, see *Adams* v. *United States*, 319 U.S. 312, 314-15 (1943).

Here, the Secretary, who played a major role in the drafting of Section 4 of the Statehood Act, promptly in 1958 issued new regulations, 23 Fed. Reg. 8874 (1958), designed to identify the pre-existing fishing rights of Indians in Alaska which the Statehood Act had preserved. Surely no one was better equipped than the Secretary to determine what these pre-existing fishing rights were. Regulations of the Department of the Interior had authorized trap fishing in appellant's reservation without interruption since 1916. The Secretary and his predecessors participated in the drafting and implementation of the 1891 Act, and have long been intimately familiar with all aspects of Alaskan fishing by virtue of their responsibilities under the White Act, 43 Stat. 464-67, 48 U.S.C. §§ 221-228. Thus, any challenge to his determination that Section 4 authorized appellant to continue to fish with traps in reservation waters "is too restrictive in view of the history and habits of Alaskan natives and the course of administration of Indian affairs in that Territory." *Hynes* v. *Grimes*, *supra*, 337 U.S. at 110-111.

IV. THE SUPREMACY CLAUSE PROHIBITS THE STATE OF ALASKA FROM DESTROYING APPELLANT'S FEDERAL RIGHT TO FISH WITH TRAPS

Appellant has demonstrated that its right to fish was created by and remains today under the protection and control of the United States Government. This being the case, State interference is precluded by the Supremacy Clause of the U. S. Constitution for at least three reasons.

A. State Law Does Not Apply on an Indian Reservation Unless Congress Expressly So Provides

Clearly Congress acted within its Constitutional authority when creating the Metlakatla Reservation and ratifying President Wilson's Proclamation. *Alaska Pacific Fisheries* v. *United States, supra; United States* v. *McGowan,* 302 U.S. 535 (1938).

As pointed out in Part II of this brief, this Court has unswervingly held that Congress can through the exercise of Federal power in the Indian country constitutionally exclude State authority. *Worcester* v. *Georgia,* 6 Pet. (31 U.S.) 515 (1832); *Williams* v. *Lee,* 358 U.S. 217 (1959). The proposition was forcefully stated in *The Kansas Indians,* 5 Wall. (72 U.S.) 737 (1866), a landmark case in which this Court held that Kansas could not tax Indian land:

> There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property or other rights, which it would have been competent to make if Kansas had not been admitted into the Union . . . As long as the United States recognizes [the Indians'] national character they are under the

> protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws. [*Id.* at 756-57]

B. Alaska's Efforts to Outlaw Trap Fishing Must Fail Under the Familiar Tests of the Doctrine of Preemption

In the instant case it is perfectly clear that any attempt by the State to enforce its anti-fish trap law would produce total and irreconcilable conflict with the rights granted under the 1891 Act and preserved by Section 4 of the Alaska Statehood Act, as these rights are defined in the Secretary's regulations. Indeed the conflict could not be more blatant: one sovereign says appellant may fish with traps; the other says it may not.

To make the case of preemption even clearer, however, a Congressional statute explicitly precludes the application of Alaska criminal jurisdiction to Indian fishing rights. In 1958 Congress tendered to the then Territory of Alaska general criminal jurisdiction over the Indian country on the same terms as it previously had to several states, 72 Stat. 545, 18 U.S.C. § 1162(a); and the State of Alaska has, by the terms of the act, succeeded to this authority. But that act, before and after Alaska's inclusion, most explicitly reserved in the United States control over Indian fishing by stating:

> Nothing in this Section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity under Federal treaty, agreement, or statute with respect to hunting, trapping, *or fishing or the control, licensing, or regulation thereof.* 67 Stat. 588, 18 U.S.C. § 1162(b). (Emphasis supplied.)

In view of the irreconcilable conflict between State and Federal law, Alaska's attempt to close down appellant's

traps must fail. *Gibbons* v. *Ogden,* 9 Wheat. (22 U.S.) 1 (1824). See also *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148 (1942); *Hines* v. *Davidowitz,* 312 U.S. 52 (1941).

C. Alaska's Efforts to Regulate Appellant's Fishing Rights Constitute an Illegal Interference With a Federal Instrumentality

State control of appellant's fishing rights would violate the doctrine that a State law which taxes, burdens or otherwise interferes with the operation of a federal instrumentality is void under the Supremacy Clause. *M'Culloch* v. *Maryland,* 4 Wheat. (17 U.S.) 316 (1819).

Appellant is a "federal instrumentality" in law, *Alaska* v. *Annette Island Packing Co.,* 289 Fed. 671 (9th Cir. 1923),[12] as well as in fact. The record shows that the Metlakatla Indian Community:

(1) Is a Federally-recognized Indian Tribe. R. 36.

(2) Operates under a Constitution and under a Federal Charter, both approved by the Secretary of the Interior on August 23, 1944. R. 5.

(3) Has, since 1915, been specifically authorized by the Secretary of the Interior to fish with traps. R. 6, 9.

(4) Has received loans from the Bureau of Indian Affairs to help develop its fishing and cannery enterprise. R. 31.[13]

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[12] That case holds that the Alaska Territorial Legislature could not impose generally applicable occupation and income taxes upon the Annette Island Packing Co. because the company was a Federal instrumentality and "the tax, if permitted, might be destructive of the means adopted by the [Federal] government to carry out its purposes and obligation." 289 Fed. at 673.

The uncontradicted record further shows that enforcement of the State anti-fish trap act would seriously burden, and ultimately destroy, this Federal instrumentality:

(1) The Community operates its own fish traps and cannery. All of the profits of the cannery are paid over to the Community, and the entire economy of the Metlakatla Community is based on the cannery. R. 10-12, 30-32, 34-35.

(2) Without the traps the cannery would be unable to obtain enough fish to operate economically. It would thus be forced to shut down entirely and thereby deprive the Community of its major source of income. R. 21.

(3) If the cannery were shut down the Community would default on its obligations to repay its loans to the Rural Electrification Administration and the Indian Revolving Loan Fund, R. 57, and would become dependent on welfare aid from the Federal Government, and the State of Alaska. R. 32.[14]

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[13] Mr. Justice Brennan, in his opinion granting a temporary restraining order, summarized these facts thus: "The Indian members of this [Metlakatla] reservation with the financial support of the Federal Government have been engaged in trapping and canning operations since 1915, and such activity provides the only means of support for substantially all the inhabitants of the reservation." 4 L. Ed. 2d at 35.

[14] In 1936 Senator Gruening, then Director of the Division of Territories and Island Possessions of the Department of the Interior, observed:

> The extension of the economic and social benefits of the Indian reorganization act to Alaska has paved the way for the security of approximately one-half of the present population of the Territory, whose stabilized future is not only an essential act of humanitarianism but also an important item of wholesome advance. [ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR, p. 30 (1936)]

These facts, which must be accepted as true since the instant case is here on appeal from the grant of appellees' motion to dismiss, conclusively show that the anti-fish trap act, as applied to appellant, unconstitutionally burdens an instrument of the Federal Government.

V. THE OPINION OF THE ALASKA SUPREME COURT IS REPLETE WITH LEGAL ERROR

Appellant has previously had occasion to point out that both appellees and the Alaska courts have treated this case and the companion case of Kake and Angoon in such a way as to blur the differences between the respective claims of right. It is necessary to analyze the Alaska Supreme Court's opinion with great care to determine which of its holdings do or do not apply to Metlakatla. Such an analysis demonstrates that in spite of the Court's assertion that "most" of its discussion on Kake and Angoon applies to Metlakatla as well, Opinion, p. 54a, the basis for its decision against Metlakatla is to be found in the concluding portion of its opinion, Opinion, pp. 55a-62a.

A. The Holdings of the Court Below

Placing the appellant's claim of right against the court's holdings, we find that the court made the following determinations with respect to Metlakatla:

1. *The 1891 Act:* Appellant argued that in the absence of an explicit repeal, the 1891 Act remains valid and in force. The Alaska Supreme Court replied:

> [The Metlakatlans] are no more entitled to or in need of fishing advantages over their fellow citizens than any other fishing community of Alaska and we do not believe that Congress intended that their temporary privilege in the waters surrounding their upland reservation continue after Statehood. [Opinion, pp. 61a-62a.]

Indeed, the Alaska Supreme Court went on to cast doubt upon the Act's initial constitutionality:

> Whether Congress had the power to so subsidize an alien immigrant group, even though they were Indian, seems doubtful. [Opinion, p. 62a.]

2. *The Presidential Proclamation:* Appellant argued that the 1916 Presidential Proclamation was valid and in force. The Alaska Supreme Court cast doubt upon its constitutionality as well:

> The power of the President to create an exclusive fishery reservation for such a group seems even more doubtful. [Opinion, p. 62a.]

3. *Section 4 of the Statehood Act:* Appellant relied upon the Statehood Act as expressly preserving the Metlakatla fishery. The Alaska Supreme Court held Section 4 inapplicable or unconstitutional on four separate grounds:

(a) Metlakatla held a "fishing privilege" at the time of the enactment of the Statehood Act, which ". . . did not qualify as a fishing rights as that term is used in Section 4 of the Act, because of its truly temporary nature." [Opinion, p. 60a.]

(b) Even if appellants had a fishing right, Section 4 of the Statehood Act is of no force or effect.

> "If it had been the intent of Congress that [Metlakatla's] privilege continue after Statehood we believe Congress would have so stated because of the affirmative duty imposed by the Alaska constitution to define any such reservation in the act of admission." [Opinion, pp. 60a-61a.]

This is apparently a specific application with respect to Metlakatla, of the Alaska Supreme

Court's general holding that Section 4 of the Statehood Act is totally invalid on the ground that there was no meeting of the minds—and hence "no contract"—between the United States and Alaska on the question of native rights:

> "We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States by the second sentence of section 12 of Article XII of the Alaska constitution and the responsive portion of section 4 of the Alaska Statehood Act. This is because no fishing rights were defined, as required by the condition in the offer to disclaim, and no fishing rights were "held" by or for natives at the time." [Opinion, p. 25a.]

(c) Even if Section 4 of the Statehood Act were valid, its amendment by Section 2(b) of the Alaska Omnibus Act was beyond the power of Congress:

> "It is our view that [Section 2(a) of the Alaska Omnibus Act] forms no part of the compact between Alaska and the United States. It was not enacted until ten months after the voters of Alaska had ratified the compact, . . ." [Opinion, pp. 20a-21a.]

The Court apparently believed that the amendment was vital to appellant's claim:

> "As originally enacted it [the second part of Section 4 of the Statehood Act] applied only to 'lands or other property'. As amended it purports to include fishing rights. In the portion of Section 4 immediately preceding, fishing rights were parenthetically included. It is only logical to assume that if it had been intended that fishing rights be included in the section following, along with 'lands or other

property', the same phraseology would have been employed." [Opinion, p. 21a.]

(d) Even if Section 4, with or without its amendment, did form a compact between the United States and Alaska, it is unconstitutional as it violates the equal footing doctrine.

> "To withhold sovereignty over its inland waters from the state in the absence of compelling reasons and without definitely describing in the act of admission the extent of the sovereignty intended to be withheld, would be a violation of the equal footing doctrine." [Opinion, p. 53a.]

4. Appellant predicated its entire argument upon the well documented premise that Indian law applies to its reservation. The Alaska Supreme Court took direct issue with a century of United States history by declaring that general concepts of Federal Indian law have

> "never been applicable to the Alaskan Indian under United States rule . . . [because] Congress has never maintained any guardianship over Alaska Indians . . . [and] . . . has never recognized any Indian tribe, nation or power in Alaska, nor treated the natives as wards in the usual meaning of that term . . . [Opinion, pp. 39a-40a.]

It is respectfully submitted that each one of the foregoing holdings constitutes a grave error of law.

B. The 1891 Act is in Force and Constitutional

As we have demonstrated, Metlakatla's water reservation was established under the authority of the 1891 Act and confirmed and reconfirmed by subsequent legislative, executive, and judicial actions—including the Statehood Act itself. Yet, in the eyes of the State

Court, the water reservation "did not survive Statehood."

If that is so, how did it die? On that point the Court does not offer any enlightenment. It would seem that its conclusion is based on the assumption that the 1891 Act, from which the water reservation was derived, was repealed by the Alaska Statehood Act. Since the 1891 Act granted both land and water rights, appellant's land reservation must also have been repealed. Yet the Alaska Supreme Court, and even the appellees, have hesitated to draw this logical conclusion from their argument.

While it is difficult to conceive of repeal of the 1891 Act by implication, it is even more difficult to conceive of its *amendment* by implication. By what mysterious action did Congress take the water portion out of the 1891 Act and leave the land in it? Alternatively, if it is assumed that the 1891 Act was repealed *in toto*, Congress has by implication—and without notice or hearing—deprived Metlakatla of everything it owns and has owned for seventy years, including the land on which the people of the Community have built their homes.

Merely to state the foregoing propositions is to demonstrate their absurdity. It is a general canon of statutory construction that an earlier specific statute is not repealed by implication by a later general statute. Ex parte *Crow Dog*, 109 U.S. 556, 570-71 (1885). And when dealing with Indian rights this Court has gone further and repeatedly reaffirmed the doctrine that statutes and treaties establishing Indian rights must be liberally construed. This doctrine was restated most recently in *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956):

> Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Worcester* v. *The State of Georgia*, 6 Pet. 515, 582. *Carpenter* v. *Shaw*, 280 U.S. 363, 367.

The Alaska Supreme Court's holding that the 1891 Act has come to an end was apparently influenced by its feeling that the act might otherwise be unconstitutional. The power of Congress, the Court says, "to so subsidize an alien immigrant group, even though they were Indians, seems doubtful."[15] Opinion, p. 62a. The simple answer to this contention is that the power of Congress to pass the 1891 Act has not seemed doubtful to *this* Court. *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918) *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 112-114 (1949). Moreover, the Alaska Supreme Court is apparently unaware that the Indian commerce clause extends the power of Congress to Indian tribes no matter where located. Until the Louisiana Purchase, many Indian tribes were located on

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[15] Metlakatlans are Tsimshian Indians. The aboriginal home of the Tsimshians lies in northern British Columbia but spills over into Alaska to include its southernmost tip. See DEPARTMENT OF EDUCATION, PROVINCE OF BRITISH COLUMBIA, BRITISH COLUMBIA HERITAGE SERIES, Series 1, Volume 6, pp. 9-10. When the ancestors of the present Metlakatlans were invited to Alaska by the Government of the United States, they "migrated" seventy miles from Metlakatla, B.C.

foreign soil. And until 1924 a great majority of American Indians were non-citizens. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, p. 154.

C. The 1916 Proclamation Is Constitutional

To the Alaska Supreme Court the Constitutional validity of President Wilson's 1916 proclamation "seems even more doubtful." Opinion, p. 62a. As we have heretofore pointed out, the *Alaska Pacific Fisheries* decision affirmed a decree which expressly relied on the President's proclamation. Moreover, the Congressional ratification of the proclamation in 1934 most clearly placed the executive act on a statutory par with the 1891 law.

D. The Statehood Act Is Applicable and Constitutional

1. Appellant's rights are "fishing rights" within the meaning of Section 4.

As its first reason for finding that the appellant's fishing reservation was not preserved by the Statehood Act, the Alaska Supreme Court held that the "[water reservation] did not . . . qualify as a fishing right as that term is used in section 4 because of its truly temporary nature". Opinion, p. 60a.

Of course it is difficult to see how rights held without interruption since 1891 are "truly temporary"! But, in any event, the duration of appellant's water reservation is not relevant to the question of whether it was preserved by Section 4. The 1891 Act set aside the Annette Islands for the use of appellant "until otherwise provided by law", 26 Stat. 1101, 48 U.S.C. § 358. Section 4 of the Statehood Act required Alaska to disclaim "any land or other property (including fishing rights)" held by or for Indians. 72 Stat. 339. The

Statehood Act did not say that Indian property or land rights had to be irrevocably held in perpetuity. If it had, it would have been a nullity, for every Indian reservation and the rights appurtenant thereto, whether created by treaty, statute or executive order is, in a sense, "temporary". In every case, Congress retains the ultimate power, whether or not it is expressly reserved, to alter, amend or repeal the rights granted, subject only to the possible application of the due process clause. *Morrison* v. *Work,* 266 U.S. 481, 485 (1915). *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 99, 116 (1960). It is therefore irrelevant that the 1891 Act expressly provides that the reservation shall exist until "otherwise provided by law." It is no more or less permanent than any other Indian reservation.

2. Section 4 of the Statehood Act creates a valid compact.

As its second reason for concluding that the Metlakatla water reservation "did not survive statehood," the Supreme Court of Alaska held "no compact as to fishing rights was formed between the State of Alaska and the United States." Opinion, p. 25a. The argument is based upon slight differences in language between Article XII, Section 12 of the proposed constitution of Alaska, which the citizens of the Territory ratified in 1956 as a basis for Alaska's admission to the Union, and Section 4 of the Statehood Act. The relevant portions are:

Alaska Constitution, Article XII, Section 12	Statehood Act, Section 4
The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, *as that right or title is defined in the act of admission.*" (Emphasis supplied.)	As a compact with the United States said state and its people do agree and declare that they forever disclaim all right and title . . . to any lands or other property (including fishing rights), the right or title to *which may be held* by any Indians, Eskimos, or Aleuts (hereinafter called natives) *or is held by* the United States in trust for said natives; . . ." (Emphasis supplied.)

The Alaska Supreme Court held:

> A comparison between the offer and response does not indicate definite agreement. The offer to disclaim by the state was conditioned on definition in the act of admission of the right or title to be disclaimed. The response merely repeated the offer to disclaim. It does not comply with the condition by defining the right or title. [Opinion, p. 18a.]

To this conclusion there are at least three obvious answers. In the first place, Alaska cannot, under the Supremacy Clause, impose conditions by which Congress must abide in enacting a Statehood Act.

Second, Congress did define the "right and title" to lands or other property held by or for Indians as that right and title which "may be held by" or "is held for" Indians. Instead of spelling out what these rights might be, Congress incorporated by reference the existing law, treaties, regulations and other factors relating to Indian fishing rights as they existed at the time of admission. Congress thus elected to preserve the *status*

quo, neither adding to nor detracting from existing Indian rights.

Third, even if the Alaska Supreme Court is correct that a statehood compact can be analogized to an ordinary contract and even if Congress failed to "accept" the offer of the Alaskan people contained in Article XII, Section 12 of the draft Alaska Constitution,[16] Section 4 would still be a valid compact between the United States and Alaska. If Congress did not accept the terms of Alaska's offer, then Section 4 must be considered a "counter offer." This counter offer was accepted by the Alaskan people when, on August 26, 1958, they approved Ordinance 3, which expressly states that:

> All provisions of the . . . [Statehood Act] reserving rights or powers to the United States, as well as prescribing the terms and conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people. [See 72 Stat. 343-44]

If any doubt remained, it would be dispelled by Section 8(b) of the Statehood Act. Out of an abundance of caution Congress had provided in Section 8(b) that if the Statehood Act were accepted by referendum of the Alaskan voters the proposed Alaska Constitution, ratified by the voters in 1956, "shall be deemed amended accordingly". 72 Stat. 443.

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[16] This "offer" must be construed in the light of Article XII, Section 13 of the Constitution of Alaska:

> SECTION 13. All provisions of the act admitting Alaska to the Union, which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people.

3. The Alaska Omnibus Act has no bearing on appellant's rights.

The third major reason assigned by the Alaska Supreme Court for holding that the Metlakatla "water reservation did not survive Statehood", is that Congress attempted in Section 2(a) of the Alaska Omnibus Act, 73 Stat. 141 (1959), to amend Section 4 of the Statehood Act and that this amendment "forms no part of the compact between Alaska and the United States." Opinion, p. 20a.

The court evidently misunderstood the meaning of this provision of the Alaska Omnibus Act. The purpose and effect of the amendment was to enlarge rather than diminish the rights of the Alaskan people. It was designed to *exclude* from the reservation of jurisdiction contained in the second clause of Section 4 *non*-Indian lands and property "the right or title to which is held by the United States." As the Senate and House reports explain, the amendment was designed to:

> [M]ake clear that "the absolute jurisdiction and control of the United States" does not apply generally to land held by the United States in Alaska, but only land and property held by natives or by the United States in trust for natives. [S. REP. No. 311, 86th Cong., 1st Sess. 9 (1959); H. R. REP. No. 369, 86th Cong. 1st Sess. 6 (1959).]

If the Alaska Supreme Court were correct that the amendment is invalid, the result would be that the overwhelming majority of its lands, title to which is in the United States, "shall be and remain under the absolute jurisdiction and control of the United States."

4. Section 4 does not deny Alaska admission to the Union on an equal footing.

In affirming the judgment of the court below, the Alaska Supreme Court expressly affirmed the district court's principal ground of decision: "to deny to new states admitted to the Union ownership of the shores and of the soil beneath navigable waters is a denial of admission on an equal footing." Opinion, p. 49a. Appellant submits that this holding is wholly erroneous.

In essence, the equal footing doctrine provides that if the United States may not constitutionally exercise a certain power in one of the original states it may not exercise that power in a new state, even though the statehood act reserves such power to the United States. Thus in the leading case of *Coyle* v. *Smith*, 221 U.S. 559 (1911), this Court held that Congress could not, as a condition of Statehood, limit Oklahoma's right to select the site for its state capital.

Appellant does not dispute that Congress cannot, *through the exercise of its power to admit new States*, deprive Alaska of sovereignty over its inland waters. The essential point, however, is that Congress retained control of appellant's reservation through the exercise of its powers over Indian tribes, and *not* through the exercise of its power to enlarge the Union. As this Court carefully explained in *Coyle* v. *Smith*:

> In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the state; *second, between compacts or affirmative legislation intended to operate in futuro, which are within the scope of the conceded powers of Congress over the subject*; and third, compacts or affirmative legislation which operates

> to restrict the powers of any such new state in respect of matters which would otherwise be exclusively within the sphere of state power. [221 U.S. at 568 (Emphasis supplied.)]

Provisions falling into the second class, the Court said, did not deny "equal footing" because they are within the scope of Congressional powers *other than the power to admit new states to the Union.*

These principles, as applied to the facts of this case, demonstrate that Section 4 of the Statehood Act is constitutional. No other conclusion is possible unless the authority of Congress to regulate Indian fishing upon the Metlakatla Reservation were derived solely from its power to admit new States to the Union. But the power of Congress to enact Section 4 is derived from its plenary authority in the field of Indian affairs. As was said by the United States Supreme Court in *Coyle* v. *Smith, supra*:

> [S]tipulations . . . in respect to the control of the United States of the large Indian reservations and Indian population of the new state, are found in the Oklahoma enabling acts. Whatever force such provisions have after the admission of the state may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the state. [221 U.S. at 570.]

Similarly, in *United States* v. *Sandoval,* 231 U.S. 28 (1913), this Court said with regard to a provision of the New Mexico enabling act which declared that the Indian liquor laws would apply to the Pueblo Indians:

> Being a legitimate exercise of [the Congressional] power [over Indian affairs], the legislation in question does not encroach upon the police power

> of the state, or disturb the principle of equality among the states. [231 U.S. at 49.]

Nor is a disclaimer provision, such as that contained in Section 4 of the Alaska Statehood Act, in any way new to the law. The statehood acts for all states which contained a substantial Indian population and were admitted to the Union since 1889 include similar disclaimers. Typical is the provision in Section 4 of the Act admitting Montana, North Dakota, South Dakota, and Washington, 25 Stat. 676, 677 (1889), which declares

> And said [state constitutional] conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of the said States:
>
> . . .
>
> Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, *the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .* (Emphasis supplied.)

See also Statehood Acts for Utah, 28 Stat. 107, 108 (1894); Oklahoma, 34 Stat. 267, 270 (1906); New Mexico and Arizona, 36 Stat. 557, 558-59, 569-70 (1910).

The Arizona disclaimer provision was recently referred to by this Court in *Williams* v. *Lee, supra,* 358 U.S. at 222, n. 10, (1959). Other disclaimer provisions have also been uniformly construed as excluding the authority of the State from the Indian Country

unless and until Congress authorizes State intervention. See, *e.g.*, *Whyte* v. *District Court*, 346 P. 2d 1012 (Colo. Sup. Ct. en banc, 1959), *cert. denied*, 363 U.S. 829 (1960); *In re Pine's Petition*, 99 N.W. 2d 38 (S. Dak. 1959); *Application of Denetclaw*, 83 Ariz. 299, 320 P. 2d 697 (1958); *State* v. *Begay*, 63 N.M. 409, 320 P. 2d 1017 (1958).[17]

E. Federal Indian Law Applies to Alaska Indians Including Appellant

Throughout this litigation appellees have advanced the argument, perhaps somewhat half-heartedly, that appellants Metlakatla, Kake and Angoon are not Indian tribes and that Congress, therefore, lacked authority to legislate with regard to them or, for that matter, with regard to any Indian tribe in Alaska. This Court, in its October Term 1959 opinion, expressed the view that on this issue, too, "enlightenment drawn on the spot by the Alaska Supreme Court may be material to any ultimate determination of federal questions . . ." 363 U.S. at 562.

Here, again, appellant submits, the Alaska Supreme Court has failed this Court. It has discussed the issue, elaborated on it, but does not appear to have reached a definitive conclusion. It comes closest to a holding on the issue of tribal status when it observes:

> What we do say is that most of the facts which created the Indian law authority relied on by appellants are absent from this case. [Opinion, p. 40a.]

[17] The United States District Court for Alaska has recently rendered a decision in which it placed reliance on Section 4 of the Alaska Statehood Act and the Alaska Omnibus Act in direct conflict with the decision of the Alaska Supreme Court in this case. See *United States* v. *State of Alaska*, 197 F. Supp. 834 (D. Alaska, 1961).

Close scrutiny of the Alaska court's opinion raises a serious question as to whether the foregoing statement was intended to apply to all three appellants or to Kake and Angoon alone. In the discussion leading up to the holding on "Indian law authority", the Court makes *inter alia* the following points:

> ". . . Congress has not historically exercised a fostering care over the communities of Kake and Angoon, . . ., nor in fact over any of the Indians of Alaska. . . . It is believed that anything resembling a communal type organization in appellant communities is recent and exists in form to comply with the loan requirements of the Wheeler-Howard Act. [Opinion, p. 38a.]
>
> . . . Congress has never maintained any guardianship over Alaska Indians . . . [Opinion, p. 39a.]
>
> . . . Congress has never recognized an Indian tribe, nation or power in Alaska, nor treated the natives as wards in the usual meaning of that term . . . [Opinion, pp. 39a-40a.]

But at another point in its opinion, the Alaska Supreme Court says the very opposite with regard to Metlakatla:

> Congress has exercised a fostering attitude toward the Metlakatlans far beyond that extended to the natives of Alaska. They were encouraged to immigrate, were given a land reservation, and although they were non-citizens, the Secretary of the Interior gave them permission to fish with traps. The President then gave them an exclusive inland water fishery reservation to supply the cannery subsidized by the government. This concern for their welfare was continued after they had attained United States citizenship and to the present. [Opinion, p. 62a]

While the opinion is not clear, it would appear that the State court did not intend its earlier discussion to apply to Metlakatla. However, on the chance that it did, appellant will demonstrate that the court erred once again.

In its consideration of the issue of Indian status, the Alaska Supreme Court went to great pains to distinguish this Court's holding in *United States* v. *Sandoval,* 231 U.S. 28 (1913). In so doing the Court reveals that it totally misunderstands the *Sandoval* decision. In that case, this Court held that it was for Congress, and Congress alone to decide whether an Indian community is to be recognized and dealt with as such. The question of recognition of an Indian tribe, like recognition of a foreign government, is a political question. "[T]he questions of whether, to what extent, and for what time [Indian communities] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress and not by the courts." 231 U.S. at 46. To the same effect is *United States* v. *Holliday,* 3 Wall. (70 U.S.) 407, 419 (1866):

> [I]t is the rule of this Court to follow the action of the executive and other political departments of the government, whose more special duty is to determine such affairs. If by them those Indians are recognized as a Tribe, this court must do the same.
>
> . . .
>
> Neither the Constitution of the state nor any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an act of Congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislation of

the state the supreme law of the land, instead of the Constitution of the United States, and the laws and treaties made in pursuance thereof.

The Metlakatla Indian Community, the record shows, has for more than seventy years been recognized by the Federal government as an Indian group to which the Federal authorities have a special relationship. This is exemplified by the following actions:

(1) Congress specifically recognized the Metlakatlans in the 1891 Act and set aside a reservation for them "to be held and used by them in common."

(2) Local self-government of the Metlakatla Community has been recognized by the Secretary of the Interior since 1915, initially under rules and regulations issued by him. See COHEN, HANDBOOK OF FEDERAL INDIAN LAW, p. 415.

(3) In 1944 the Secretary of the Interior approved a Constitution and By-Laws for the Metlakatla Indian Community under the provisions of 25 U.S.C. § 476 and issued a Charter under the provisions of 25 U.S.C. § 477. (Official copies of these documents were submitted directly to this Court at the October Term 1959 hearing.)

(4) Congress has appropriated funds under the "Indian Sanitation Facilities Program", established by 73 Stat. 267 (1959), which have been earmarked explicitly for expenditure on a community water supply project at Metlakatla during the 1962 fiscal year. S. REP. No. 294, 87th Cong., p. 21.

Thus Congressional recognition of the Metlakatla Indian Community and concern for its welfare ranges from March 3, 1891 to as recent a date as June 2, 1961, the date of publication of Senate Report No. 294 of the 87th Congress. The fact is that special Federal assistance with regard not only to Metlakatla but to all

Alaska's natives continues to be expected by responsible officials, including the greatest champion of Alaska statehood, Senator Ernest Gruening. In urging his colleagues to restore funds to the Interior Department appropriation bill for the current fiscal year so as to enable the Department to buy a steamship which would facilitate Federal assistance to Alaska's natives, the Senator declared on June 6 and 7, 1961:

> It would be a body blow to the Secretary of the Interior, *in his responsibility for taking care of the Indians and Eskimos of Alaska,* if this item remains deleted. 107 CONG. REC. 8866 (Daily ed.)
>
> I think it is at least as important to take care of our own population as it is to take care of the needy populations in 105 other areas of the world. There is no alternative unless we intend to deprive many of our own people of the essentials of life. This appropriation is not for a luxury; it is not socialistic. Nothing has changed in this respect since Alaska became a State. These American citizens are dependent on the Federal Government for supplies, for education, and health services . . . They are still, in many respects, the wards of the Federal Government, and *the responsibility of the Federal Government still persists.* 107 CONG. REC. 9044 (Daily ed.) (Emphasis supplied).

CONCLUSION

Felix S. Cohen, whom this Court has recognized as "an acknowledged expert in Indian law" *Squire* v. *Capoeman,* 351 U.S. 1, 8-9 (1956), said in his definitive treatise, the HANDBOOK OF FEDERAL INDIAN LAW (p. 404):

> The legal position of the individual Alaskan natives has been generally assimilated to that of the Indians in the United States. It is now substantially established that they occupy the same relation to the Federal Government as do the In-

dians residing in the United States; that they, their property, and their affairs are under the protection of the Federal Government; that Congress may enact such legislation as it deems fit for their benefit and protection; and that the laws of the United States with respect to the Indians resident within the boundaries of the United States proper are generally applicable to the Alaskan natives.

Acting on the assumption that it has continuing responsibility for the natives of Alaska, the United States has acted to protect Metlakatla's cannery and with it its community from economic ruin. The issue posed by this case is whether the United States has the power to do so. Appellant has demonstrated that the United States has that power. The judgment of the Supreme Court for the State of Alaska should, therefore, be reversed.

Respectfully submitted,

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Date: November 17, 1961

APPENDIX A

Statutes Involved

1. Section 15, Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358:

Annette Islands reserved for Metlakahtla Indians.

Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans, who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

2. Presidential Proclamation No. 1332, April 28, 1916, 39 Stat. 1777:

. . .

WHEREAS the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and

WHEREAS it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery,

Now, therefore, I, WOODROW WILSON, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean

low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned.

3. Sec. 3(c) of the Act of May 7, 1934, 48 Stat. 667:

The granting of citizenship to the Indians described in Section 3(b) of this title shall not in any manner affect the rights, individual or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakatla Colony. And any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to the modification, alteration, or repeal by the Congress or the President, respectively.

4. Section 4, Alaska Statehood Act, 72 Stat. 339 (1958):

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the

right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe. . . .

5. Section 8(b), Alaska Statehood Act, 72 Stat. 343-344 (1958):

At an election designated by proclamation of the Governor of Alaska, . . . there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, by separate ballot on each, the following propositions:

* * * *

"(3) All provisions of the Act of Congress approved July 7, 1958 reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people."

In the event each of the foregoing propositions is adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly. . . .

6. Sec. 2(a) Alaska Omnibus Act, 73 Stat. 141 (1959):

Section 4 of the Act of July 7, 1958 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words "all such lands or other property, belonging to the United States or which may belong to said natives", and inserting in lieu thereof the words "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives."

7. Article XII, Section 12, Constitution of the State of Alaska:

The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States.

8. Article XII, Section 13, Constitution of the State of Alaska:

All provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people.

9. Chapter 95, Session Laws of Alaska, April 17, 1959:

Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; . . . nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives.

Sec. 2. Section 1 of Chapter 17, SLA 1959, is hereby amended to read as follows:

Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but no limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or waters owned or hereafter acquired by the State of Alaska. . . .

. . .

Sec. 5. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year, or by a fine not to exceed $5,000.00, or by both such imprisonment and fine.

10. Regulations of the Bureau of Indian Affairs, Department of the Interior, *Commercial Indian Fishing in Alaska*, 25 C.F.R. Pt. 88 (1961 Supp.):

§ 88.1 Scope.

The regulations in this part implement section 4 of the Act of July 7, 1958, 72 Stat. 339, as amended, by declaring existing fishing rights of Indians in Alaska and providing for the protection and control thereof. Provisions for those rights which derive from the Act

of June 6, 1924, as amended, 48 U.S.C. 221 et seq., a
the limitations and sanctions necessary to preser
such rights are included herein. The regulations
this part are permissive, but shall not be construed
a limitation upon any native rights not mentioned
this part.

§ 88.2 Restrictions on Indian traps.

(a) *Subject to the limitations of paragraph (e)
this section,* not more than twenty-one salmon
traps may be, but are not required to be, utilized
the purpose of salmon trap fishing by Indian villag
Such fish trap operations, if the natives elect to enga
in them, shall be conducted as heretofore only at
hereinafter described, and within the fishing distric
and fishing sections defined in the 1960 edition of
regulations of the Alaska Board of Fish and Ga
for Commercial Fishing in Alaska.

• • •

(d) Metlakatla Indian Community (Annette Islan
Fishery Reserve): Salmon trap fishing is permitte
but not required, at the following sites within
southeast section of the Clarence Strait District fro
the opening date set by the State of Alaska for
salmon purse seine fishing in the General Section of
southern district to the closing date set by the State f
any salmon purse seine fishing in the southeast sectio
of the Clarence Strait District, or one week followi
the closing date set by the State for any salmon pur
seine fishing in the General Section of the southern di
trict, whichever date is later:

. . . [description of eight authorized locatio
omitted] . . .

(e) During the 1960 fishing season and until th
Secretary or his authorized representative determin
otherwise, and if the villages elect to operate any fis
traps, the villages may operate traps only at the fol
lowing sites: . . . Metlakatla: (2), (3), (4), and (6).

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Nos. 2 and 3

In the Supreme Court of the United States

OCTOBER TERM, 1961

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, A FEDERALLY CHARTERED CORPORATION, APPELLANT

v.

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA, AND THE STATE OF ALASKA

ORGANIZED VILLAGE OF KAKE, AND ANOOON COMMUNITY ASSOCIATION, APPELLANTS

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA

ON APPEALS FROM THE SUPREME COURT OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ARCHIBALD COX,
Solicitor General,
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

When these cases were previously before this Court (363 U.S. 555), the views of the Solicitor General, on behalf of the United States, were stated to the Court, and the position of the United States was also presented to the Supreme Court of Alaska when it later

heard the case. The primary interest of the Federal Government arises out of its special and continuing relationship to Indians, including the Indians of Alaska, as well as the particular responsibilities laid upon the Federal Government, with respect to Indians in Alaska, by Section 4 of the Alaska Statehood Act. That is the dominant reason for our participation in this case in support of the appellants. But the Federal Government, as represented by the Department of Justice, also has a subsidiary (but not inconsistent) concern—to present the reasons for our view that appellants' (and comparable) fishing rights are not "vested" or compensable under the Fifth Amendment so that, if those rights are held (contrary to our view) to have been terminated by the Statehood Act or the admission of Alaska as a State (or if they are subsequently ended by Congress or the Executive), there can be no constitutional or statutory claim against the United States for just compensation. We do not believe that this subsidiary position is at all inconsistent with our primary concern to support the Indians against the State of Alaska, or that the Court need pass in this case upon the validity of our subordinate contention, but we think it appropriate to set it forth so that there be no misunderstanding, in this or other litigation, as to our stand if and when the issue of compensability should become relevant.

SUMMARY OF ARGUMENT

The Supreme Court of Alaska has rejected appellants' claim that the Alaska fish trap legislation was not intended, as a matter of State law, to apply to

appellants. There still remain the federal issues mooted before this Court at the 1959 Term, and on those questions the opinion of the court below has not caused any change in the position of the Federal Government in support of appellants. We first restate that position, and then respond to the novel reasons advanced by the Alaska Supreme Court for holding against appellants.

I

Section 4 of the Alaska Statehood Act provides for a disclaimer by the State of all right and title to lands or property, including "fishing rights", held by Indians or other natives (or by the United States in trust for them), and also that these interests are to remain under the "absolute jurisdiction and control" of the Federal Government until disposed of under its authority. Under these provisions, Alaska lacks jurisdiction to require the elimination of the appellants' fish traps because the Federal Government retains all rights of regulation and control.

1. Read against the historical and legislative background, the term "fishing rights"—which was specially added late in the consideration of the bill—in Section 4 is broad enough to cover appellants' fishing interests, whether they be vested and compensable as against the United States (as has been asserted), or merely discretionary with the Federal Government (as we believe). Congress was aware of the prior judicial history in which comparable interests had been characterized as "rights" in the very opinions which held them not to be vested but subject to full

regulation by the United States; Congress was also aware of claims that certain Indian rights in Alaska were vested. In these circumstances, Congress made it plain that it did not desire to disturb the status quo, but that the aim of Section 4 was to preserve the situation as it was—including, we believe, continued federal control over Indian fishing.

If the term "fishing rights" (as well as the term "property") in Section 4 were confined to rights vested as against the United States, the Indian portion of Section 4 would, in our view, lose all meaning and effect. The only two Indian reservations in Alaska—the Metlakatla and Karluk reservations—are clearly not of the vested type; and in our opinion no communal Indian rights in the State fall into that category. The result would be that both Congress and Alaska would have adopted a useless, or almost useless, provision. More than that, the status quo would be gravely disturbed, contrary to the Congressional purpose, by the abolition on statehood of the only two Indian reservations in Alaska.

The nub of it is that the terms "property" and "fishing rights" in Section 4 do not refer to the character of the Indian interest *as against the United States,* but only with respect to third parties. As to the latter, those interests are clearly "property" and "rights"—whatever their status vis-a-vis the Federal Government.

2. At the same time, we note expressly that in our view the Statehood Act did not vest, grant, or recognize any Indian rights as compensable against the United States, and that prior to statehood those rights

were not vested or compensable. Both the terms of Section 4 (particularly the first proviso) and its history show that Congress so understood the position of the Federal Government and wished to leave the matter in status quo.

3. The reservation of federal control over Indian fishing, regardless of vested rights, is not inconsistent with the "equal footing" to which Alaska is entitled. Even after admission of a State, Congress retains power to deal with Indian matters within the State under its powers over Indian commerce and public lands (see *Coyle* v. *Oklahoma,* 221 U.S. 559, 570, 594; *United States* v. *Sandoval,* 231 U.S. 28, 38); that authority has long been recognized and exercised. Under these granted powers, Congress could have formally created temporary Indian reservations preserving appellants' fishing rights, but the same grant also authorized the lesser reservation of power to regulate and control.

II.

The novel bases of the decision of the Supreme Court of Alaska are erroneous.

1. Despite the doubts of that court, it is settled that the federal Indian power extends to Alaska and its Indians, both prior to statehood and now. See, *e.g., Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78; *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86.

2. The court thought Section 4 of the Statehood Act invalid and inoperative because in the court's view it conflicted with or did not meet the require-

ments of the proposed constitution for Alaska adopted in 1956. The short answer is that, both by its terms and under the admission procedure, Section 4 was controlling and the State constitution was automatically amended on statehood to accord with Section 4.

3. Various other erroneous considerations were taken into account in the opinion below. In particular, the court erred in assuming (a) that appellants are not true Indian communities subject to the aid and protection of the Federal Government, and (b) that fish traps are necessarily destructive of conservation interests.

ARGUMENT

When these cases were here before, the Court envisaged the possibility that the Supreme Court of Alaska might interpret the Alaska fish trap legislation as not affecting these appellants—thus avoiding constitutional and other federal issues (363 U.S. at 561-2). That has not come to pass. The Alaska court has squarely applied the State statutes to the appellants, and has reached and decided significant federal questions. We find nothing in the court's opinion on these issues requiring us to change our position, as presented to the Court at the 1959 Term. In Point I, we re-state our position as previously advanced. In Point II, we consider the new arguments proffered by the Supreme Court of Alaska.

I.

THE STATE OF ALASKA LACKS JURISDICTION TO REQUIRE THE ELIMINATION OF THE APPELLANT INDIANS' FISH TRAPS

We fully agree with the basic position of appellants that officials of the State of Alaska are not authorized to prohibit operation of the appellants' 11 fish traps.

A. *Introduction.*

Fishing has always been a matter of predominant importance to the natives of Alaska, as well as to the non-native inhabitants, as this Court has more than once recognized. See *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78; *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86. Prior to the admission of Alaska as a State, commercial fishing in the Territory was regulated, not by the Territorial Government, but by the Federal Government under the White Act of June 6, 1924, 43 Stat. 464. The Secretary of the Interior, charged with administering that Act, did not prohibit fish traps but did regulate their use both by natives and by others. As of the date of admission, the appellants had 11 authorized traps.

Upon Alaska's admission in January 1959, the legal situation changed. Section 6(e) of the Statehood Act (App. A, *infra,* p. 43) provided that "the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws" until the elapse of a specified period "after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the adminis-

tration, management, and conservation of said resources in the broad national interest." Under this authorization—and implementing the provisions of the Alaska Constitution barring fish traps—the Secretary prohibited, during the year 1959, the use of fish traps (*except for the appellants*) by commercial fishermen in Alaskan waters. See *Ketchikan Packing Co.* v. *Seaton,* 267 F. 2d 660 (C.A.D.C.). In the early part of 1959, Alaska adopted legislation dealing with its fish and wildlife resources, and the Secretary (on April 27, 1959) made the certification contemplated by the proviso in Section 6(e) of the Statehood Act. On January 1, 1960, under this proviso, the State assumed general regulatory authority over fish and wildlife and the power of the Federal Government under the proviso was no longer effective. The general control of fishing in Alaska passed to the State.

The Secretary continued, however, to assert his authority over the use of fish traps by appellant Indians. In the spring of 1960, he promulgated regulations permitting them to operate 11 fish traps, and this permission has been continued. 25 C.F.R. Part 88; 25 Fed. Reg. 3079, 4864–6; 26 Fed. Reg. 7064. As the prime basis for his action, the Secretary relied on Section 4 of the Statehood Act (App. A, *infra,* pp. 41–42), which is permanent legislation dealing with "any land or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives." The issues now remaining in this litigation

hinge upon the proper interpretation of this phase of Section 4, and upon its validity.

B. *Control over Indian fishing was reserved to the United States under Section 4 of the Alaska Statehood Act.*

The full text of Section 4 (before amendment by the Alaska Omnibus Act of 1959) is as follows (App. A, *infra*, pp. 41–42):

> SEC. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that [all such lands or other property, belonging to the United States or which may belong to said natives], shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided,* That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this

> Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further*, That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions or alienation. [Brackets added.]

By the Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, the words we have bracketed in Section 4 were stricken, and there was substituted the words: "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives" (App. A, *infra*, p. 44).[1]

In our view, the correct construction of this Section is that the federal right over and power to control Indian lands, fisheries, and other interests were preserved in status quo, just as they had been prior to statehood. There was neither relinquishment of rights and a grant to the State (as it contends), nor

[1] It is plain, we believe, that the addition of "including fishing rights," was merely a correction and clarification of the original intent of Section 4, and not a true change or addition. See also *infra*, p. 21, fn. 6.

was there a recognition or grant of rights to the Indians as against the United States. Preservation of that existing situation unchanged was not, we believe, inconsistent with equal footing or with the Submerged Lands Act. But preservation of the existing situation does mean that the Federal Government continues to have exclusive control over Indian fishing in Alaska.

1. The precise terms of Section 4 (as amended in 1959), as they bear on the Alaska Indians, deserve careful analysis because those terms embody the exact powers retained by the Federal Government in this field. The statute first provides that "as a compact with the United States" the State disclaims all right and title to *"any lands or other property (including fishing rights)*, the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands *or other property (including fishing rights)*, the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the *absolute jurisdiction and control of the United States* until disposed of under its authority * * *" (emphasis added). But the Section immediately goes on, in its first proviso, to provide explicitly that the Statehood Act shall not in any way affect, for or against the claimants, "any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto". The proviso then emphasizes its purpose to leave all pre-existing claims totally unaffected by the State-

hood Act by declaring that nothing in the Act should be read to authorize, establish, recognize, or confirm the validity or invalidity of any such claim.

Our reading of Section 4, in the light of this first proviso (which was added at the request of the Department of Justice), is (a) that Congress retained in the Federal Government, for the future, "absolute jurisdiction and control" over all Indian fishing, whether or not those "fishing rights" could be considered compensable "property" in the conventional sense, but (b) that Congress did not wish to take any stand whatever with respect to claims against the United States by Alaska Indians that they had compensable property, including compensable fishing rights, of which they could not be deprived without compensation. In other words, where money was involved—*i.e.*, "claims" against the Federal Government—Congress deliberately intended to leave matters in status quo, and made no grant or confirmation to the Indians. Where money was not involved—"absolute jurisdiction and control" over Indian fishing from the viewpoint of regulation—Congress deliberately intended to keep full control in the Federal Government (*i.e.*, under the protection of the Interior Department) over Indian "fishing rights" (rather than to vest control in the State), whether or not those "fishing rights" rose to the dignity of compensable rights or were mere privileges accorded by the Federal Government in its discretion. The "fishing rights" of which Section 4 speaks need not be true vested property rights—and, in our view, were not—but they are fishing privileges, or "rights" in a

broader sense, subject to regulation and control by the Federal Government. By the same token, other Indian "property" or "land", as those terms are used in Section 4, need not be land or property to which the Indians have vested rights against the United States.

2. That appellants' "fishing rights" are covered by Section 4 whatever their character—a reading which is certainly consistent with the face of the language Congress used—seems to us to become plain when one considers the Alaskan Indian background and the legislative history of the Statehood Act.

(*a*). There is nothing in the bare words "fishing rights" to prevent the fishing rights or privileges enjoyed for years by appellants prior to statehood, even though non-compensable, from being characterized as fishing "rights", and even as "property", under Section 4. Those general terms are not necessarily limited to interests which are vested so that they cannot be destroyed without compensation; rather, ambiguous words such as these take their meaning from the context, as well as the background and purposes of the particular legislation in which they appear. With respect to the Alaskan Indians, their fishing and comparable interests have often been called "rights" by the very opinions which hold them *not* to be vested; see the use of the word "right" or "rights" in the cases discussed *infra*, pp. 14–17.

(*b*). Congress's pre-statehood treatment of the Alaska Indians shows that by the terms "fishing rights" and Indian "property" in Section 4 it must

have meant the interests of these appellants. No other type of Indian "rights" existed in Alaska, and non-compensable interests like the appellants' were frequently referred to as "rights" in the prior judicial history.

The United States has never, by treaty or agreement, established permanent homes—*i.e.*, created "recognized Indian title"—for any of the Alaskan natives. In two instances—those involved in *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, and *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86—reservations, including adjoining fishing waters, have been set aside for the temporary use of the appellants in No. 2 (the Metlakatla) and for the Native Village of Karluk. In *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, this Court held that an alleged taking of "unrecognized" Indian title from Alaskan natives was not compensable under the Fifth Amendment "because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States * * *" (348 U.S. at 285).[2] This decision further rejected the claim (which had been sustained by the Court of Appeals for the Ninth Circuit in *Miller* v. *United States*, 159 F. 2d 997) that statutes of 1884 and 1900—providing (in general) that natives in Alaska should not be disturbed in their possession of land actually

[2] It is of interest that the *Tee-Hit-Ton* opinion describes the government's position in that case as follows (348 U.S. at 277):

> The Government denies that petitioner has any compensable interest. It asserts that the Tee-Hit-Tons' *property* interest, if any, is merely that of the *right* to the use of the land at the Government's will; * * *. [Emphasis added.]

occupied by them—were a recognition of a right of permanent occupancy. The Court repeated the distinction, strongly emphasized in the *Hynes* case,[3] between permissive occupation and a grant of vested rights and held that in the federal statutes "what was intended was merely to retain the *status quo* until further congressional or judicial action was taken" (348 U.S. at 278). The Court went on to say that "[t]his policy of Congress toward the Alaskan Indian lands was maintained and reflected by its expression in the Joint Resolution of 1947 * * *" which authorized the action alleged in the *Tee-Hit-Ton* case to constitute a taking. Subsequently, the Court of Claims dismissed another petition of the Tee-Hit-Tons seeking recovery for the alleged taking of an exclusive right of fishing. *Tee-Hit-Ton Indians* v. *United States,* 132 C. Cls. 624. After referring to the materials on which the Indians relied to establish a private exclusive right of fishing, the Court of Claims said (pp. 625–626):

> According to the present law, such a right could not be acquired, even by a purported grant from the Executive. The Act of June 6, 1924, 43 Stat. 464, "For the Protection of the Fisheries of Alaska," provides in Section 1 that

[3] In *Hynes* (337 U.S. at 103), the opinion described the situation as follows:

> An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such *rights* may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim. [Emphasis added.]

> "no exclusive or several right of fishery shall be granted" in Alaskan waters.

And after citing *Shively* v. *Bowlby*, 152 U.S. 1, and *Sutter* v. *Heckman*, 1 Alaska 81, the court concluded (pp. 626–627):

> If we, as the plaintiff's quoted authority says we must do, indulge every presumption against the supposition that at some time in the remote past a grant was made, though the evidence of it has been lost, this is no case for prescription, since those familiar with the history of the times say it was contrary to the policy of the Government to make such grants.

A year earlier, the Court of Claims had dismissed a petition seeking recovery for the alleged taking of the right of an Alaskan group to take seals. *Aleut Community of St. Paul Island* v. *The United States*, 127 C. Cls. 328. The court held (pp. 334–335):

> Whatever rights the Aleuts had to take seals in the waters off St. Paul Island under Russian dominion, there can be no doubt that upon acquisition of that territory by the United States their *right* to do so was subject to the paramount power of the United States to regulate and control it. [Emphasis added.]

It then concluded, referring to the various Acts of Congress relating to seal fishing (pp. 335–336):

> Under these Acts, the only *right* plaintiff had to kill seals was the *right* to kill them for food and clothing and for use in the manufacture of small boats, and for the benefit of the United States. The Government had the right to prohibit altogether plaintiff from engaging in sealing and, hence, had the right to permit it to do

> so only on the conditions imposed. When plaintiff killed seals it killed them for the benefit of the United States and with knowledge that the United States would sell the skins and put the proceeds of sale in its own treasury. Seals killed by the natives were Government seals. [Emphasis added.]

Concerning alleged exclusive rights of fishing, the Court, in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, held that the White Act of June 6, 1924, 43 Stat. 464, under which the Secretary of the Interior regulated commercial fishing in Alaska, could not be used to enforce an exclusive right of fishing and that the enforcement provisions of that Act could not be used to implement the Executive Order issued under another statute which created the Karluk Reservation and its fishing rights. However, the Court did approve (fn. 53, p. 123) *Dow* v. *Ickes*, 123 F. 2d 909 (C.A. D.C.), which sustained the permission given by the Secretary for trap fishing at certain locations.

In summary, our view is that, at the time of passage of the Alaska Statehood Act, the general policy of Congress had not been to create vested rights of fishing in Alaska but had been to permit trap fishing by particular fishermen (including Indians)—*i.e.*, Congress had authorized the award of noncompensable "fishing rights." Permanent rights for Indians, either in lands or in fishing rights, had never been created by treaty, agreement, recognition of "original Indian title," or otherwise. Two temporary reservations, especially of waters adjoining the lands for fishing purposes, had been created for the Metlakatla (appellants in No. 2) and one other group.

And Congress had clearly protected the natives' actual possession pending further Congressional action.[4]

(*b*). Our construction of Section 4, as referring to appellants' non-compensable interests when it uses the term "fishing rights," accords with the intent of Congress, as shown by the legislative history of that Section. In Hearings before the Senate Committee on Interior and Insular Affairs on S. 50, 83d Cong., 2d Sess., the subject of native rights was considered from many aspects (*e.g.*, pp. 122, 135, 137). The nature of pending cases, including the Court of

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[4] One further factor requires mention. Under a Special Jurisdictional Act of June 19, 1935, 49 Stat. 388, the Tlingit and Haida Indians of Alaska filed suit in the Court of Claims to recover for the alleged taking of Indian title to "southeastern Alaska, lying east of the one hundred and forty-first meridian." The Court of Claims held (in October 1959) that they were entitled to recover for the taking, or for the failure of the United States to prevent others from taking, rights of these Indians to some 20,000,000 acres of land and adjacent waters in Alaska. *Tlingit and Haida Indians of Alaska* v. *United States*, 177 F. Supp. 452. The first action of the United States said by the Court of Claims to be a taking from the Tlingit and Haida Indians was the establishment of the Metlakatla Reservation here involved (*id.*, p. 467). The Court of Claims said that the "most valuable asset lost to these Indians was their fishing rights in the area they once used and occupied to the exclusion of all others" (*id.*, p. 468). The case was ordered to be tried on the issue of amount of damages.

We by no means agree with this interlocutory decision on the issue of liability but considered it inappropriate to seek review by this Court since the issue as to amount of damages has not been determined and that determination may well influence the question whether the case is important enough to warrant review by this Court.

Claims *Tlingit* case, mentioned ~~below~~ above (fn. 4), was explained (pp. 206 *et seq.*). The then pending *Tee-Hit-Ton* case (*supra*, pp. 14–15) was discussed (p. 210), as were the *Hynes* case and the Ninth Circuit *Miller* case (pp. 211–216), *supra*, pp. 14–15, 17. See also *id.*, pp. 231–235, 260–268, 284, 293, 339.

The House Committee in the 84th Congress (H. Rept. No. 88, 84th Cong., 1st Sess.) said (p. 47): "It is provided that no attempt will be made to deal with the legal merits of the indigneous rights but to leave the matter in status quo for either future legislative action or judicial determination." The House Committee in the 85th Congress, 1st Sess. (H. Rept. No. 624, p. 19) repeated this statement of the purpose of Section 4 and the proviso. The Senate Committee expressed the same thought in more detail, saying (S. Rept. No. 1163, 85th Cong., 1st Sess., p. 15):

> * * * The bill in its present form does not and is not intended to change or affect the laws of the United States relating to jurisdiction over Indian or native lands.
>
> The first proviso of section 4 directs that nothing contained in the act shall be construed to affect the existence or validity of any claim against the United States nor be construed as an interpretation of the meaning or application of any Federal law pertaining to such claims. The purpose of the proviso is to leave the legal question as to the existence or validity of any claim against the United States, including native claims, in exact status quo, and to leave the question for subsequent legis-

lation or judicial decision without expressing any opinion or mandate in this act.

The second proviso includes within the compact a stipulation that the State shall not impose taxes on property of the United States or native property except to the extent authorized or to be authorized by Congress, but the restriction on taxation does not apply to property held by individual natives in fee without restrictions on alienation. This proviso expresses existing law as it applies within the States and is not intended to effect any change in such law.

Moreover, Congress did add the phrase "(including fishing rights)," over the objections of the Department of Justice (which feared that the phrase might raise an implication that these Indian fishing "rights" were compensable rights).[8] As we have suggested, *supra*, pp. 12–13, this added phrase can properly be read, together with the proviso to Section 4, as making sure that the Federal Government would retain control over Indian fishing, and not as endowing these "fishing rights" with the character of compensable property. For it is indisputable from the legislative history summarized above that Congress was fully informed as to the differences of view as to native rights in Alaska and expressed, in every possible way, its intent to preserve the status quo—including federal control over Indian fishing

[8] See H. Rept. No. 624, 85th Cong., 1st Sess., p. 31; S. Rept. No. 1163, 85th Cong., 1st Sess., at p. 47.

in Alaska. No reason appears why the Act should not be interpreted to give effect to that intent.[6]

3. It is suggested by the court below and by the State that the admission of Alaska abolished the Metlakatla Reservation or at least that part extending 3,000 feet from land.[7] If the phrase in Section 4, "any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives," is read to mean property to which the Indians have *vested rights* as against the United States, like treaty reservations or recognized Indian title, then it would follow under the State's contention that the Metlakala and Karluk reservations had been abolished by creation of the State. But such a construction is precluded by the fact that it would simply

[6] The amendment of Section 4 by the Alaska Omnibus Act was made, in part, to make sure that the provision "all such lands * * * shall be and remain under the absolute jurisdiction and control of the United States" would not be interpreted to apply to lands of the United States in Alaska other than those used by natives. The importance of this limitation is emphasized by the fact that, as of June 30, 1959, the United States owned 99.1 percent of the land in Alaska. (See Inventory Reports of Real Property Owned by the United States Throughout the World (General Services Administration, 1959).) If the new State had no criminal or civil jurisdiction over the vast area, its authority would be very severely limited. See S. Rept. No. 331, 86th Cong., 1st Sess., p. 9; H. Rept. No. 369, 86th Cong., 1st Sess., at p. 6.

[7] The suggestion that the Proclamation reserving the waters became void after statehood for lack of definiteness plainly lacks merit in view of *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 113–114.

read this provision out of the Act—since it would not and could not apply to any property in Alaska (see *supra*, pp. 14–18)—and would also mean that Congress had been performing vain acts in inserting the proviso in Section 4 (*supra*, pp. 9–10) and in revising the language of that Section in the Alaska Omnibus Act of 1959, *supra*, pp. 10, 21, so as to clarify the original intent. That amendment emphasizes the original language of Section 4 that "all such lands * * * shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority."

The basic argument, premised on the bare word "property," is that only technical vested property rights, valid as against the United States, are preserved in status quo and that, therefore, the temporary withdrawals in *Hynes* v. *Grimes Packing Co.*, *supra*, and *Alaska Pacific Fisheries*, *supra*, were automatically canceled upon admission of the State. This is a denial of the whole course of history in dealing with Alaskan Indian lands and waters, as well as the intention of Congress and the people of Alaska in connection with admission of the State to the Union.[*] Abolition of the only two Indian reservations in Alaska cannot be called preservation of the status quo.

The argument also ignores the fact that "property" has a different meaning when rights as against the United States are concerned and when rights as against others are involved. Thus, in *Tee-Hit-Ton*, *supra*, p. 285 the only holding was that original Indian title "creates no rights against taking or extinction by

[*] See also *infra*, pp. 31–34, 36–37.

the United States protected by the Fifth Amendment or any other principle of law." The same is true of reservations created by Executive Order. *Sioux Tribe of Indians* v. *United States,* 316 U.S. 317. *United States* v. *Santa Fe Pacific R. Co.,* 314 U.S. 339, holding that the Indian occupancy was to be respected until extinguished by the United States, makes the distinction clear between rights as against others and as against the United States. This distinction was again emphasized in *Hynes* v. *Grimes Packing.*

For these reasons, we contend that Section 4 continues federal control over appellants' fishing even though "fishing rights" are neither vested nor compensable as against the United States. But we also believe that it is unnecessary for the Court in this suit to decide or consider the rights of the Indians vis-à-vis the United States. So far as the State of Alaska is concerned, the result of the litigation must be the same whether the appellants' fishing rights are vested or not. A discussion of rights as between the United States and the natives should be rejected here for the same reason that the argument by the third party was rejected in *Beecher* v. *Wetherby,* 95 U.S. 517, repeated in *Tee-Hit-Ton,* where, concerning Indian occupancy, the Court said (p. 525):

> It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter

open to discussion in a controversy between third parties, neither of whom derives title from the Indians.

4. On the other hand, as indicated above, we feel that we should make it plain that we cannot agree that the Statehood Act vested, granted, or recognized any rights compensable against the United States. Rather, as we have said, we think that the Act referred to those rights of temporary possession, until the United States should act otherwise, which were being exercised, especially by means of appellants' fish traps, at the time of the passage of the Act and the admission of Alaska to the Union.

Nor can we agree with any implications in the phrases, in the proposed Indian fishing regulations published by the Interior Department on April 9, 1960, 25 Fed. Reg. 3079—referring to appellants' "fishing rights which have long been recognized; which derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq. [the White Act], other Federal statutes, regulations and customs; and which were secured to the Alaska Eskimos, Indians and Aleuts by section 4 of the Alaska Statehood Act", and characterizing the proposed regulations as "declaring existing fishing rights of Indians in Alaska"*—insofar as these terms may tend to imply that appellants' fishing "rights" are in any way vested or protected as against action by the Federal Government, or legislatively "recognized" as against the Federal Government, so as to be immune from alteration or abolition without payment of compensation.

*See also 25 Fed. Reg. 4864, and 25 C.F.R. 88.1.

Similarly, we do not believe that Section 4 of the Statehood Act—in retaining "absolute jurisdiction and control" in the United States over Indian property, including fishing rights—made it mandatory for the Secretary of the Interior to continue to grant fish-trap privileges to appellants.[10] Our position is that under Section 4 of the Statehood Act the Secretary has full discretionary authority, pursuant to the White Act, 44 Stat. 752, 48 U.S.C. 221, to regulate and control Indian fishing in Alaska; he is no more compelled to permit the use of fish-traps in 1962 than he was in 1959 (see *Ketchikan Packing Co.* v. *Seaton*, 267 F. 2d 660 (C.A.D.C.)), but he has the power to do so if he chooses. The Secretary has full authority to do what he considers proper for the protection of Indian fishing rights,[11] including enlargements of fishing rights beyond those now enjoyed, subject to his consideration of other pertinent factors, including conservation.

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[10] A press release issued by the Interior Department on April 7, 1960, in connection with the publication of the proposed regulations, seems to assume that the Secretary is *required* to permit these fish-traps, that he has no discretion to decide against their use in 1960 or thereafter, and that only Congress can decide to do away with the use of fish-traps by appellants. As indicated in the text, *supra*, we do not agree with these assumptions and have so informed the Department of the Interior. We may add that, in our view, the Department of Justice has never advised the Interior Department that the Secretary has no alternative but to permit the appellants to operate their traps if they choose to do so, or that only Congress can abolish the use of fish-traps by appellants.

[11] The views of the Department of the Interior on the rights of the Indians and the duties of the Secretary are set forth in Appendix B, *infra*, pp. ~~45-49~~. That Department still adheres to those views. 45-49

Conversely, if the Secretary does elect to permit the use of fish-traps by appellants, in 1962 or future years, he will not be acting contrary to the White Act's proviso against the grant of an exclusive right of fishery (see *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 116–123).[12] By virtue of Sections 4 and 6 of the Alaska Statehood Act, the White Act can apply, from 1960 onward, only to Indian fishing in Alaska—control over non-Indian fishing now being lodged wholly in the State—and the Secretary's decision to allow Indians to use fish-traps would not discriminate against any person now subject to the White Act. The separate treatment accorded appellants (as compared to non-Indian fishermen) stems, not from any grant to appellants of an exclusive or special right under the White Act, but simply from the fact that the Act now applies only to Indian fishing. There is no discrimination or special treatment under the White Act as it now exists.

C. *The reservation of federal control over Indian fishing, regardless of vested rights, is not inconsistent with "equal footing" or with the Submerged Lands Act.*

1. The basic case of *Coyle* v. *Oklahoma*, 221 U.S. 559, recognized that "equal footing" does not prevent

[12] This proviso read as follows:

Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. * * *

reservation of federal power as to matters which are within the constitutional powers of the Federal Government; the Court made reference (pp. 570, 574) to the power to regulate commerce among the States and with the Indian tribes and also public lands. See also *United States* v. *Sandoval*, 231 U.S. 28, 38. Since the authority over Indians arises from the commerce clause and the treaty and war-making powers, as well as from the control of disposition of federal property,[29] its exercise is not and cannot be limited simply to reserving lands for Indians. Because of the history of federal-Indian relations, and because of the geographic situation in continental United States, that control was exercised, first, in terms of reserving areas for use by the Indians to the complete exclusion of whites and of state law, and, later, to modified amalgamation with the white population by the allotment process and permissive application of state law to a limited degree, subject always to federal controls for the protection of the Indians. See *Board of Comm'rs* v. *Seber*, 318 U.S. 705, 716, where the Court summarized the history and stated that, "The plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions." Cf. *Williams* v. *Lee*, 358 U.S. 217. The power has not rested on any considerations of the principles of property law or of the existence of rights—legal, equitable or moral—in particular lands.

[29] As to the various sources of the "federal power to regulate and protect the Indians and their property against interference even by a state", see *Board of Comm'rs* v. *Seber*, 318 U.S. 705, 715.

Thus, while the Indians have no such right as against the United States in lands temporarily set aside for their use, such as reservations created by Executive Order, *Sioux Tribe* v. *United States*, 316 U.S. 317, this Court has never held that this circumstance diminishes the federal power to regulate such Indians or permits application of conflicting state law. Cf. *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99.

When dealing with Indians in the northwestern United States where fishing, especially in tidal waters, was of great concern and required protection to promote the welfare of the Indians, the courts have recognized that such compelling circumstances may produce an exception to the results that might otherwise follow from admission of a State to the Union. Although it is often said that tidelands in territories are held in trust for future states and that title thereto vests in the State upon admission, that is not the result when a reservation has been created for Indians prior to statehood. *Moore* v. *United States*, 157 F. 2d 760 (C.A. 9), so held in concluding that the State of Washington's fishing regulations did not extend to tidelands of the Quillayute Indian Reservation.[14] In *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, this Court said (pp. 87–88):

> That Congress had power to make the reservation inclusive of the adjacent waters and sub-

[14] See, also, *Shively* v. *Bowlby*, 152 U.S. 1, 48, 57–58; *Taylor* v. *United States*, 44 F. 2d 531, 533 (C.A. 9); *Montana Power Co.* v. *Rochester*, 127 F. 2d 189, 191 (C.A. 9); *United States* v. *Romaine*, 255 Fed. 253, 259 (C.A. 9).

merged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. *National Bank* v. *County of Yankton*, 101 U.S. 129, 133; *Shively* v. *Bowlby*, 152 U.S. 1, 47–48, 58; *United States* v. *Winans*, 198 U.S. 371, 383. The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safeguarding and advancing a dependent Indian people dwelling within the United States. See *United States* v. *Kagama*, 118 U.S. 375, 379, *et seq.*; *United States* v. *Rickert*, 188 U.S. 432, 437.

It is clear that rights to the fishing sites here concerned could have been specifically reserved by Congress through creation of a temporary Indian reservation, regardless of whether permanent beneficial rights might be later vested in the Indians. See, *e.g.*, Section 4 of the Statehood Act for Montana, North Dakota, South Dakota, and Washington, 25 Stat. 676, 677; Utah Statehood Act, 28 Stat. 107, 108; Oklahoma Statehood Act, 34 Stat. 267, 270; Statehood Act for New Mexico and Arizona, 36 Stat. 557, 558–559, 569–570. It follows, we believe, that the comparable reservation of power to control and regulate Indian fishery may constitutionally be reserved, and that this is what was done with respect to Alaska. The specific reservation in Section 4 of the Alaska Statehood Act is the reason *Ward* v. *Race Horse*, 163 U.S. 504, is irrelevant here; in that case,

the Statehood Act contained no such specific reservation. See 163 U.S. at 511.

2. What we have said disposes likewise of any contention based on the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1311–1315, which specifically excepts from State authority "lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band or group of Indians or for individual Indians" (43 U.S.C. 1313 (b)). The Submerged Lands Act is specifically referred to in Section 6(m) of the Alaska Statehood Act, which says that Alaska "shall have the same rights as do existing States thereunder." Certainly, Congress saw no conflict between that Act and the reservation of control over Indian fisheries in Section 4 of the Statehood Act.

II.

THE BASES OF THE DECISION OF THE SUPREME COURT OF ALASKA ARE ERRONEOUS

The opinion of the Supreme Court of Alaska did not undertake to prove that appellants are wrong if one accepts the assumption that the intention of Congress in the Statehood Act is to be given effect. Instead the court considers that the admission of Alaska, regardless of the intent of Congress, *necessarily* abolished many existing rights, including even the Metlakatla reservation which was sustained by this Court in *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78. The reasoning of the opinion is contrary to history, as explained in the opinions of this

Court, as well as to the explicit language of the Statehood Act.

A. *Congress had power to reserve federal jurisdiction over Alaska native fishing, and did so in Section 4.*

Although, as we have shown in Point I, *supra*, pp. 9 *ff*, the intent of Congress was to preserve the status quo as to native rights in Alaska, the Alaska Supreme Court has now held, in effect, that Congress had no power to do so. As a consequence, the decision renders totally ineffective this part of Section 4 of the Alaska Statehood Act, especially the reference to "fishing rights." It states (Opinion 25):[16] "We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States * * *." This conclusion errs in two basic particulars.

1. *The federal Indian power extends to Alaska.*— The opinion discusses the history of Alaskan natives at length, compares actions taken in Alaska with those in New Mexico with relation to the Pueblo Indians (Opinion 32–35), asserts that the natives here have never "been treated as wards of the United States" (Opinion 36–38), claims that "Congress has never maintained any guardianship over Alaska Indians" (Opinion 39–40), and concludes that no federal authority over Alaskan natives survived statehood. This discussion confuses fundamental power with its exercise. Different local problems create many differences in the manner in which the federal Indian authority is exercised. And lack of complete exercise

[16] The Appendix to the 1961 Statement as to Jurisdiction, in Nos. 2 and 3, consists of the opinion of the Supreme Court of Alaska.

of a power in every instance does not negate the existence of that power or warrant the imposition of limitations upon it. Thus the fact that, in New York, the State has undertaken many of the functions which are exercised elsewhere by the United States does not detract from the federal authority to take appropriate action for the Indians' protection in that State. *United States* v. *Forness,* 125 F. 2d 928 (C.A. 2); *United States* v. *National Gypsum Co.,* 141 F. 2d 859 (C.A. 2). In *National Gypsum,* Judge Augustus Hand said (p. 863):

> For many years it has been the understanding of the Department of the Interior, the Commissioner of Indian Affairs and the State authorities that the Tonawanda Reservation stood in a unique position and that its transfer to the Comptroller in trust empowered the State to provide for leases of reservation lands and that leases of such lands have been made under a comprehensive plan set up under State authority and warranted by the terms of the original treaty with the Tonawandas. It is not doubted that Congress could make other provisions for the disposition of the lands of the Tonawandas and can make them for any further leases, but until it does so we think that a status so long maintained with the approval of the United States government should be recognized and is not in contravention of 25 U.S.C.A. § 177, R.S. § 2116.

The New York Indians, together with the Alaskan natives and the Pueblos of New Mexico, presented problems so different that they were treated in separate chapters in Cohen, *Handbook of Federal Indian*

Law (Dept. of Int., 1942, pp. 401–425); and in the revision, *Federal Indian Law* (Dept. of Int., 1958), they are treated in Chapter XI, entitled "Special Groups and Laws." But that does not negate the continuing existence of federal authority.

This Court confirmed the power to create the Metlakatla reservation, including the surrounding water, in *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, applying the law relating to the public purpose (p. 88) "of safe-guarding and advancing a dependent Indian people dwelling within the United States. See *United States* v. *Kagama*, 118 U.S. 375, 379, et seq.; *United States* v. *Rickert*, 188 U.S. 432, 437." The statement in the present case (Opinion 62) that "[w]hether Congress had the power to so subsidize an alien immigrant group, even though they were Indians, seems doubtful" demonstrates that the Alaska court refuses to accept the *Alaska Pacific Fisheries* decision and is now suggesting, more than 40 years later, after heavy investments have been made and much reliance placed on it, that it should be overruled.

Nor is the statement (Opinion 59) that the effect of the Metlakatla statute "was to create the only exclusive right of fishery ever to exist in Alaskan waters" accurate. That was the precise purpose of the order creating the Karluk Indian Reservation which this Court held valid in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, again applying the same principles as control Indian matters in other areas.[10] This Court there

[10] For the decree entered making the fishery exclusive, see *Hynes* v. *Grimes Packing Co.*, 185 F. 2d 338 (C.A. 9).

spoke (pp. 110–111) of "the history and habits of Alaska natives and the course of administration of Indian affairs in that Territory" and proceeded to summarize some of that history, including the *Alaska Pacific case* (p. 114): "The conditions as to the waters around the Annette Islands closely parallel those of other Alaska areas actually occupied by natives." In *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, this Court again applied to Alaska natives the same principles applicable to Indians in other areas, when the argument was advanced that a different rule should apply to Alaskan natives. The Court of Claims and the Court of Appeals for the Ninth Circuit have also assumed that the federal Indian power extends to Alaska (*supra*, pp. 14–18).

Since the existence of the federal Indian power in Alaska and its exercise in ways appropriate to the situation and the needs of the natives of Alaska is so clearly established by this Court, it seems unnecessary to document further this error of the Supreme Court of Alaska.[17]

2. *The proposed Constitution for the State of Alaska did not limit the power of Congress to reserve jurisdiction in Section 4 of the Statehood Act.*—The plain

[17] A closely related error of the Alaska Supreme Court is its claim (Opinion 24) that Congress has made no distinction in the past between Alaskan natives and whites. This is clearly refuted by the history we have outlined *supra*, pp. 14–18, as well as by the fact that Section 4 of the Statehood Act plainly rests on the assumption that distinctions between natives and others have been made in the past. If there were no such distinction, the terms of Section 4 would be meaningless. See *supra*, pp. 10 *ff.*

purpose of Congress, as expressed in Section 4 of the Statehood Act, has been frustrated by the following course of reasoning: (a) The Constitution resulting from the convention authorized by the Territorial Legislature in 1956 provided in Section 12 that the proposed State of Alaska disclaimed title to property including fishing rights which may be held by or for any Indian, etc., "as that right or title is defined in the act of admission" (Opinion 16); (b) that this Constitution "can be considered an offer" to which Section 4 of the Statehood Act was the response, thereby forming "a compact between sovereigns" (Opinions 16–17); (c) that (Opinion 18):

> A comparison between the offer and response does not indicate definite agreement. The offer to disclaim by the State was conditioned on definition in the act of admission of the right or title to be disclaimed. The response merely repeated the offer to disclaim. It did not comply with the condition by defining the right or title;

(d) that no fishing rights, enforceable against the United States, were "held" by or for the natives at the time of statehood (Opinion 24) and (e) (Opinion 25):

> We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States by the second sentence of section 12 of article XII of the Alaska constitution and the responsive portion of section 4 of the Alaska Statehood Act. This is because no fishing rights were defined, as required by the condition in the offer to disclaim, and no fishing rights were "held" by or for natives at the time.

The court's own recital of the process of admission of Alaska to the Union shows the fallacy of this reasoning. Regardless of the draft Constitution, Congress, after careful study over a period of years (see *supra*, pp. 18–21), stated the terms of admission in the Alaska Statehood Act. This was the "offer" that was made. Not only was ratification by the voters of Alaska required, specifically in proposition 3 (72 Stat. 343–4), to the reservation of rights and powers to the United States in Section 4 of the Act (Opinion 20), but also, in a provision not mentioned in the opinion below, it was provided (72 Stat. 339, 344):

> In the event each of the foregoing propositions is adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, *shall be deemed amended accordingly.* * * * [Emphasis added].

Section 4 of the Statehood Act thus controls, and the terms of the 1956 draft of the Alaska Constitution are plainly irrelevant.[18]

This error—the mistaken assumption that the State did not agree to any effective reservation favoring the Indians and did not change its Constitution accordingly—pervades the entire opinion. It is the basis of the refusal to recognize (Opinion 30–31) the

[18] Far from supporting the Alaska court's argument, *Boeing Aircraft Co.* v. *Reconstruction Finance Corp.*, 25 Wash. 2d 642, 171 P. 2d 838, appeal dismissed, 330 U.S. 803, dealing with the Washington Constitution, restated the basic principle: "the polestar in the construction of Constitutions is the intention of the makers and adopters."

clear distinction of *Ward* v. *Race Horse*, 163 U.S. 504, *supra*, pp. 29–30, in which the Wyoming Statehood Act contained no reservation comparable to Section 4. Ignoring the amendment of the 1956 Alaska Constitution as a result of the Statehood Act results in the mistaken charge (Opinion 45–46) that the Secretary of the Interior disregarded Article VIII, section 15, of the Alaska Constitution (prohibiting exclusive rights or special privileges of fishery) in permitting appellants to continue to use traps. This same error is the basis of the claimed violation of equal footing (Opinion 53) and of the Submerged Lands Act (Opinion 54)—both of which points assume the non-existence of any effective reservation in the Statehood Act —and it is again asserted, in discussing the Metlakatla situation, where the opinion speaks of "the affirmative duty imposed by the Alaska constitution [on Congress] to define any such reservations in the act of admission" (Opinion 60–61). All of these assertions are, we submit, fallacies resting on the erroneous foundation that the Indian portions of Section 4 never became effective.

B. *Other matters mentioned in the opinion do not support the result.*

1. The opinion emphasizes the importance of fishing to the economy of Alaska. As this Court has recognized in the *Alaska Pacific* and *Hynes* cases, fishing is of equal, if not greater, importance to the existence and development of the native communities. *Supra*, pp. 7, 14–15.

2. There is no true support for the apparent assertion (Opinion 38) that the appellant communities

were simply formed to secure the financial benefits of the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 461, and that they did not earlier exist in groups or villages. The true history detailed by this Court in the *Alaska Pacific Fisheries* and *Tee-Hit-Ton* cases, *supra,* and by the Court of Claims in the *Tlingit & Haida* case, *supra,* is to the contrary." See *supra,* pp. 14–18. Indeed, the Wheeler-Howard Act controverts the assertion that the Alaskan natives have not been treated as wards of the United States. That Act, entitled the "Indian Reorganization Act," is described in *Federal Indian Law* (Dept. of Int., 1958, pp. 128–129) as one of the three most comprehensive measures dealing with Indian affairs. The same work, at page 938, states that the extension of the Act to Alaska, accomplished by the Act of May 1, 1956, 49 Stat. 1250, "has removed the last significant difference between the position of the American Indian and that of the Alaska native."

3. While recognizing that there have been conflicting views on the question whether the use of fish traps should be outlawed, the Alaska court's discussion would indicate that this was simply a contest between economic interest on the one side and conservation and social interests on the other (Opinion 4–10, 24, 28–29). There was, of course, no evidence taken from expert biologists or others on these factual matters. The fact is that there is substantial basis to support

[19] The Court of Claims in its opinion (177 F. Supp. at pp. 454–456, 461–462) discusses the nature of the Alaskan native villages at some length and its findings, not printed in the Federal Supplement, describe the matter in great detail (Fdgs. 23–32).

the conclusion that fish traps, which are fixed in place, can more easily be regulated to promote conservation than can many moving boats. It is inappropriate to engage here in an extended discussion on this subject. However, the Department of the Interior has advised us that the 11 traps operated in the 1961 season produced a catch of some 1,022,449 fish, valued at $547,785, and that the total catch "is in excess of any year since 1949."[20] This seems contradictory to the picture of a constantly dwindling supply of fish caused by traps, as the opinion below would seem to indicate (*e.g.*, 5–6).

4. Finally, it should be emphasized that the Supreme Court of Alaska misunderstands our position when it says that the government claims a reserved right to regulate fishing by individual natives anywhere in Alaska (Opinion 27, 28–29). We do not make any such claim in this case. What this case involves are the fish traps that had been operated by the native *villages* or *communities* in the past.[21] The court's refusal to recognize the difference between

---

[20] For comparison purposes, the catch in the last seven years was as follows:

Year	Number of Traps	Number of Fish	Value
1955	8	351,373	$166,700
1956	9	525,866	275,705
1957	8	266,387	158,547
1958	11	536,619	302,750
1959	11	327,466	231,265
1960	11	173,284	100,541
1961	11	1,022,449	548,184

[21] The legislative history of Section 4 of the Statehood Act is addressed to the village or group activities, not to fishing by individual natives throughout Alaska.

the problems of this case—the communal fishing by the villages in their long accustomed places—and the activities of individual natives throughout the State, appears again in the incorrect comparison between the total catch of the village trap and that of "a gill net or purse seine fisherman" "from the point of view of conservation" (Opinion 29). The true comparison, if relevant at all, would be between the fishing of the entire village, as a community, and the catch of the village's traps.

CONCLUSION

For the foregoing reasons, it is submitted that the judgments below should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
OSCAR H. DAVIS,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
Attorney.

NOVEMBER 1961.

APPENDIX A

The Alaska Statehood Act, 72 Stat. 339, provides in pertinent part as follows:

Section 1.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 8(c) of this Act, the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska entitled, "An Act to provide for the holding of a constitutional convention to prepare a constitution for the State of Alaska; to submit the constitution to the people for adoption or rejection; to prepare for the admission of Alaska as a State; to make an appropriation; and setting an effective date", approved March 19, 1955 (Chapter 46, Session Laws of Alaska, 1955), and adopted by a vote of the people of Alaska in the election held on April 24, 1956, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

* * * * *

Section 4.

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any

lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided,* That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further,* That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.

* * * * *

Section 6 (e).

* * * *Provided,* That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: * * *.

* * * * *

Section 8 (d).

Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

* * * * *

2. The Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, provides in Section 2, under the rubric "Federal Jurisdiction":

> (a) Section 4 of the Act of July 7, 1958 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words "all such lands or other property, belonging to the United States or which may belong to said natives", and inserting in lieu thereof the words "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives".
>
> (b) Section 6(e) of said Act is amended by striking out the word "legislative" and inserting in lieu thereof the word "calendar".

APPENDIX B

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., May 4, 1960.

By messenger
90-2-0-544

Hon. J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington, D.C.

Dear Mr. Rankin:

We have reviewed the draft of brief which you propose to file *amicus curiae* in the Supreme Court in *Metlakatla Indian Community, Annette Island Reserve* v. *Egan, Governor of Alaska, et al.*, No. 326, and in *Organized Village of Kake, et al.* v. *Egan, Governor of Alaska*, No. 327.

We are pleased to see that your study of these cases has led you to conclude that the court has jurisdiction and that the cases have not become moot. We are also pleased to note your position that the purpose of section 4 of the Alaska Statehood Act was to maintain the status quo until the Congress should provide otherwise. That is the position which this Department has consistently taken and which has been communicated to you in our prior correspondence and discussions.

In response to your invitation, we should like to restate and expand the expression of the views and position of the Department of the Interior on two points which are touched upon by the proposed brief

and which have been the subject of several discussions between representatives of our two departments. These being matters of predominant importance to the natives of Alaska they are, by that token, of the greatest concern to the Secretary of the Interior in his traditional role as the officer of the executive branch of the Government charged by law with the administration of Indian affairs and the execution of the national policy respecting the Indians.

The two points to which we refer are somewhat interrelated. They have to do with (1) whether the purpose and effect of section 4 of the Alaska Statehood Act, as amended, was to define and classify Indian fishing rights as vested, compensable property, and (2) the scope of the Secretary's regulatory power over the Indian fishing activity.

Section 4 of the amended Statehood Act preserves in status quo full Federal control over Indian lands and other property, including fishing rights. It does this in terms that withhold these matters from the reach of State authority, reciting specifically that they shall "be and remain under the absolute jurisdiction and control of the United States." Quite clearly, from the language of section 4 in its entirety as well as its legislative history, Congress manifested its intent to maintain the status quo, taking this action with knowledge of the prior rulings of the Supreme Court which recognized that the ultimate power to resolve the problem of native rights in Alaska rested with the Congress. See *Hynes* v. *Grimes,* 337 U.S. 86 (1949); *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955). This means to us that the Congress maintained in status quo the position of the United States as it existed immediately before statehood, namely, the continuation of full Federal control over the Indian fishing activity and the retention of full Federal power to define, classify, resolve and determine the nature and extent of Indian fishing rights.

Also, the Congressional purpose to maintain the status quo must mean to us that the Indians' rights, whatever their nature, were preserved under full Federal authority for ultimate determination by the Congress or the courts. The act made clear the lack of State authority but made nothing compensable as against the United States which was not compensable before statehood. We feel these conclusions must surely inhere in the conception that the Statehood Act was designed to maintain the status quo.

Any exercise by the Secretary of the Interior of regulatory power over the Indian fishing activities obviously must be by way of implementation of the Statehood Act and cannot be contrary to the Congressional objective of maintaining the status quo. So considered, the Secretary of the Interior in regulating the Indian fishing activity was required to continue the Indians' fish-trap operations as he found them to be immediately before statehood. The statute speaks in terms of the *natives'* fishing rights which, as we have demonstrated, are to be maintained in status quo until the Congress or the courts may clarify or resolve the matter. It follows logically that the natives' fishing rights could not be maintained in status quo by the Secretary of the Interior regulating their fishing activity in a way that would limit it to something less than that visible to the Congress when section 4 of the Statehood Act was enacted. Moreover, the Statehood Act, speaking in terms of native fishing rights cannot be equated into a grant of power to the Secretary to limit or eliminate Indian fishing. We must reject categorically the idea that section 4 of the Statehood Act, designed to maintain the status quo, also clothed the Secretary of the Interior with unlimited discretionary authority to limit or shrink the Indian fishing activity that existed on the instant before statehood. It has been recognized by the courts

that the power to regulate cannot be exercised in a way that abridges or destroys the Indian rights which are the subject of the regulation. See *Mason* v. *Sams*, 5 F. (2d) 255 (1925); *Tulee* v. *Washington*, 315 U.S. 681 (1942). And no remnants of regulatory power under the White Act (48 U.S.C. 221) could have survived the Statehood Act so as to clothe the Secretary with discretionary authority to limit or destroy the Indian fishing activity which Congress had held in status quo. The view that the Secretary of the Interior is clothed with full discretionary authority under the White Act to shrink the Indian fishing activity after the enactment of the Statehood Act undermines and makes ineffective the entire concept of Congress having maintained the status quo until it could resolve the problem of native rights as a matter of legislative prerogative. Indeed, the argument in favor of full discretionary authority in the Secretary to regulate Indian fishing after Alaska statehood must lead to the illogical conclusion that the Secretary of the Interior, being without Congressional direction or limitation, could not only limit the Indian fishing activity but could enlarge it as well. Here, again, the fallacy of the view that the Secretary has full discretionary authority is demonstrated merely by reference to the Congressional intention to preserve the status quo.

Historically, the purpose of retained federal controls in Indian matters has always been the protection of the Indians, and the Secretary of the Interior, in the exercise of regulatory authority over the subject denominated by the Congress as Indian "fishing rights" could not lose sight of the historical obligation to protect the Indians' rights, and to do so within the law.

To summarize:

1. The purpose and effect of section 4 of the Alaska Statehood Act was to maintain the status quo, leaving undisturbed after statehood the noncompensable character of those Indian fishing activities which were noncompensable before statehood.

2. The Secretary of the Interior, in exercising regulatory authority over the Indian fishing activity, must do so by way of implementation of the Statehood Act and cannot, by regulation, limit or terminate the fish-trap operations in which the Indians were engaged immediately before statehood.

Sincerely yours,

GEORGE W. ABBOTT, *Solicitor.*

[*Note:* By letter of August 3, 1961, to the Department of Justice, the Department of the Interior stated that it still maintained the views set forth in the Solicitor's letter of May 4, 1960, *supra.*]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 3

ORGANIZED VILLAGE OF KAKE, AND ANGOON COMMUNITY ASSOCIATION, *Appellants,*

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA, *Appellee.*

On Appeal from the Supreme Court of the State of Alaska

STATEMENT AS TO JURISDICTION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 3

ORGANIZED VILLAGE OF KAKE, AND ANGOON COMMUNITY ASSOCIATION, *Appellants,*

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA, *Appellee.*

On Appeal from the Supreme Court of the State of Alaska

STATEMENT AS TO JURISDICTION

Appellants appeal from a decision of the Supreme Court of the State of Alaska handed down June 2, 1961, affirming the judgment of the District Court for the District of Alaska in Juneau, acting as an interim or

transitional state court, dismissing a claim for injunctive relief. This jurisdictional statement is submitted to show: (1) the Supreme Court has appellate jurisdiction, and (2) a substantial question is herewith presented under the rules of this Court.

THE OPINION BELOW

The opinion of the court below, rendered June 2, 1961, is reported in 362 P. 2d 901. A copy of said opinion is included in the separate Appendix filed on behalf of these appellants and also the Metlakatla Indian Community with whom the case was argued and decided below.

The case is already on the docket of this Court pursuant to a previous appeal from the transitional court. It is now Docket No. 3 (associated with No. 2, *Metlakatla Indian Community* v. *Egan*). The decision of this Court directing appellant to proceed with their appeal to the Supreme Court of Alaska, for clarification of certain issues, is reported in 363 U.S. 555. The opinion of Mr. Justice Brennan, as Circuit Justice, upon a temporary restraining order pending the previous appeal, is reported in 80 S. Ct. 33 and 4 L. ed. 2d 34. The opinion of Kelly, J. of the District Court for the District of Alaska appears in the printed record in Docket 2-3 and is reported in 174 F. Supp. 500. Supplemental findings of fact appear at pages 67-69 of the record of the previous appeal, No. 2-3.[1]

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[1] The record in Dkts. 326-327, O.T., 1959 (now Dkts. 2 and 3, O.T. 1961), in which an opinion of this Court has been rendered, 363 U.S. 555, served the Supreme Court of Alaska as the record in this case and has been designated as the major part of the record on appeal. This is the "printed record" referred to herein. S.R. refers to the supplemental record printed in that case.

JURISDICTION

1. The suit of the appellants is to enjoin the enforcement of certain Alaska criminal statutes (17 S.L.A. 1959, 95 S.L.A. 1959) on the grounds that the Alaska penal statutes, as to the appellants, are in conflict with federal statutes and regulations.

2. The Supreme Court of the State of Alaska entered judgment June 2, 1961, affirming the judgments of the court below in dismissing the suit for injunction. Notice of appeal was filed in the Supreme Court of the State of Alaska on July 25, 1961.

3. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. 1257(1) and (2). The Supreme Court also retains continuing jurisdiction in this case under its opinion 363 U.S. 555, pp. 561-562.

4. The cases believed to sustain the jurisdiction of the Supreme Court are as follows:

Gully v. *First Nat'l Bk.*, 299 U.S. 109;
Mallinckrodt Chemical Works v. *Missouri*, 238 U.S. 41;
New York ex rel. Bryant v. *Zimmerman*, 278 U.S. 63;
Green Bay, etc. Canal Co. v. *Patten Paper Co.*, 172 U.S. 58.

5. The provisions of the statutes, orders and proclamations involved are set forth in the red-covered Appendix to Brief of Kake and Angoon, No. 327, O.T., 1959. (No. 3 O.T. 1961). The citations are as follows:

Treaty with Russia, Mar. 30, 1867, 15 Stat. 539, 542, Art. III

Federal Statutes Involved

Revised Statutes, Provisions Common to All the Territories, 1874, § 1839

Alaska Civil Government Act, May 17, 1884, 23 Stat. 24, § 8 proviso
Title 48, United States Code, §§ 101, 112
Judicial Code, Title 28 U.S.C., §§ 1291, 1294
Alaska Statehood Act, July 7, 1958, 72 Stat. 339, §§ 1, 4, 6(e), 7, 8(a), (b), (c), (d), 12, 13, 14, 15, 16, 17, and 18.
Alaska Omnibus Act, June 25, 1959, 73 Stat. 141 §§ 2(a), (b)
White Act, June 6, 1924, as amended, 43 Stat. 464 (48 U.S.C. § 221 *et seq.*)

Constitution of Alaska, Art. IV, §§ 1, 2, and 3; Art. VIII, § 15; Art. XII, §§ 12 and 13; Art. XV, §§ 2, 4, 17, 24, and 25 and Ordinance No. 3.

Rules, Supreme Court of Alaska
Rule 7
Rule 53
Rule 54

Session Laws of Alaska, 1959
Chap. 17
Chap. 50
Chap. 95
Chap. 151

Proclamations of the President

Jan. 3, 1959, 24 F.R. 81, Admission Alaska

Interior Department
Release Apr. 7, 1960
[Proposed] Indian Fishing Regs., Alaska, 25 F.R. 3079, Apr. 9, 1960
Statement, All Fish Traps, Indian and non-Indian

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Do Alaska statutes, to the extent they regulate or prohibit fishing by Indians with the use of traps, conflict with the express reservation to the United States of exclusive jurisdiction over property (including fishing rights) of Indians pursuant to Section 4 of the Statehood Act of Alaska, 72 Stat. 339, as amended by Section 2(a) of the Alaska Omnibus Act, 73 Stat. 141?

2. Is Section 4 of the Alaska Statehood Act inoperative for failure to comply with the conditions annexed to the offer of the people of Alaska in their constitution as to the terms and circumstances under which they abjure jurisdiction over Indian fishing?

3. Is the Alaska Statehood Act, Section 4, as amended, unconstitutional under the Federal Constitution for conflict with the equal-footing doctrine?

STATEMENT OF THE CASE

The State of Alaska and the United States (through regulations issued by the Secretary of the Interior) each assert jurisdiction, to the exclusion of the other, to regulate trap fishing by appellants.

Appellants, Village of Kake and Angoon Community Association, are each an Indian corporation chartered pursuant to the Indian Reorganization Act of 1934 (48 Stat. 984, 988, as amended, 49 Stat. 1250, § 17; 25 U.S.C. § 477); and each has as its membership an entire village of Thlinget Indians. S.R. 82-83, 102. The Village of Kake is located on the northwest side of Kupreanof Island, approximately 100 miles southwest of Juneau, Alaska, and that of Angoon is located on

the southwest side of Admiralty Island approximately 60 miles southwest of Juneau. Each of these appellants operates a fish cannery under the supervision of the Secretary of the Interior and with funds borrowed from the United States Government. S.R. 83, 103. The canneries were purchased with the active assistance of the United States Government through the Bureau of Indian Affairs of the Department of the Interior, and upon the advice of that Agency. Operation of traps is essential to the operation of the canneries at this time. Closing the canneries would wipe out the economic base of the members, leaving the villages with no means of self-support, the resulting damage extending to the very fiber of their social, economic and cultural well-being. S.R. 88-89, 108.

On July 7, 1958, Congress enacted the Alaska Statehood Act, 72 Stat. 339, under the terms of which the Alaska Constitution was ratified and affirmed. Under Section 4 of the Statehood Act, the State disclaimed all right and title to the land and property which Congress reserved to the control of the United States, namely, "to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts. . . ." The third ordinance of the Constitution of Alaska abolished all use of fish traps in Alaska. Section 6(e) of the Statehood Act withheld control of the Alaska fish and wildlife from Alaska until the Secretary of the Interior certified the transfer. In November, 1958, the Secretary of the Interior announced his intention to abolish fish traps in Alaska with the exception of native-owned traps. On February 25, 1959, and April 17, 1959, the Legislature of Alaska enacted 17 S.L.A. 1959 and 95 S.L.A. 1959 making it a crime to erect, moor or maintain fish

traps on or over lands or tidelands owned by the State of Alaska. On March 7, 1959, the Secretary of the Interior issued regulations (24 F.R. 2053) prohibiting fish traps generally, but exempting from the prohibition native fish traps. Some traps of each of the appellants were designated for operation. S.R. 84-85, 104. The Secretary based this distinction in treatment of Indian and non-Indian traps on the disclaimer of Indian fishing rights made by the State and on the long-standing supervisory control exercised by the United States for the protection of the Indians. S.R. 85, 104-105.[2]

Notwithstanding appellants were thus authorized to operate, appellee (Governor Egan), both personally and by his agents, threatened appellants with seizure of their traps and criminal prosecution of the persons installing and maintaining them, and, on June 15, 1959, actually seized a trap which Kake had set out and arrested the President of the Kake Council and the foreman of the crew which set the trap. S.R. 86, 105-106.

HOW THE FEDERAL QUESTION IS PRESENTED

The complaints charged, among other things, that Section 4 of the Statehood Act and Article XII, Section 12, of the Constitution of Alaska, prevented the state from interfering with the control and management of Indian fishing rights held by the Indians or

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[2] See letter to Alaska Area Director set out at length at S.R. 131-132. On the 2nd day of June, 1960, 25 F.R. 4864-6, the Secretary again issued regulations. The 1960 regulations are in their nature permanent, subject to modification from time to time by the Secretary of the Interior. On July 26, 1961, 26 F.R. 7064, delegation for the enforcement of these regulations was made to the Regional Director of Region 5, Bureau of Commercial Fisheries, Juneau, Alaska.

United States as trustee on their behalf; that the regulations allowing appellants to operate constituted an exercise by the United States of its exclusive powers over the fishing rights of Indians; that the regulation of Indians was exclusively in the United States; and that the state statutes were repugnant to the statutes and the commerce clause of the Constitution of the United States. S.R. 87-88, 106-107. A preliminary and a permanent injunction were prayed. S.R. 91-92, 110-111.

The Judge of the District Court in his opinion dismissing the complaint stated at the outset that the facts gave rise to a situation "where the exercise of claimed state power and authority collides with the exercise of claimed federal power and authority. . . ." R. 60. He resolved that conflict in favor of the state under the "equal-footing" doctrine, holding that the new state was deprived by the federal regulations of authority over its underlying navigable waters and of its "absolute right" to control the killing of game. He held that "the Secretary of the Interior is without authority to except the fish traps of the plaintiffs from his Order dated March 7, 1959, 24 Fed. Reg. 2053-71, prohibiting the use of fish traps in Alaskan waters effective April 18, 1959; and that the State of Alaska has authority to prohibit all fish traps in Alaskan waters, inclding those of the plaintiffs. . . ." R. 66.

On July 11, 1959, Mr. Justice Brennan, acting in his capacity as a Circuit Justice, granted appellants' application for an injunction pending final disposition of their future appeals to the United States Supreme Court (80 S. Ct. 33). On June 20, 1960, this Court handed down a decision affirming its own jurisdiction under 28 U.S.C. § 1257(2) "since the court below

sustained a statute of the State of Alaska against a claim of unconstitutionality under the United States Constitution." 363 U.S. at p. 557. But inasmuch as the Alaska Supreme Court had not had the opportunity to pass upon certain antecedent questions of local law involved, the Court refrained at that stage from deciding the issues presented on the merits so as to afford the Alaska Supreme Court the opportunity to rule on questions open to it for decision. This Court noted "the original act prohibiting traps was amended by 95 S.L.A. 1959, § 1, so as to provide that it shall not be construed inconsistently with the compact, and if the Alaska court determines as a matter of statutory construction that the compact was designed to leave with the United States, as to Indian fishing, the power it exercises under the White Act, a constitutional question now appearing on the horizon might disappear." 363 U.S. at pp. 561-562.

The Supreme Court of the State of Alaska in its opinion interpreted 95 S.L.A., 1959, as not excepting Indian fishtraps from the operation of the act, App. pp. 46a-47a. The Alaska Supreme Court (App. pp. 34a *et seq.*) attempted to supply information suggested by this Court on the status of the Indian communities in relation to the authority of the Secretary of the Interior without reopening the record or according the parties any opportunity for hearing; and it supplied this information from sources wholly outside the record, contrary to the record, and to known fact and recognized authorities.[3] The Supreme Court of Alaska

[3] *E.g.*, the court stated "there are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law." App. p. 34a. See, however, *Tlingit & Haida Indians of Alaska* v. *United States*, ... C. Cls. ...., 177 F. Supp. 452, describing in detail the Tlingit tribe and the lands aboriginally

also, at the request of this Court, addressed itself to the justification of this legislation under the police power concluding that the power withheld from the state under the proviso to regulate native fishing is a type which the federal government cannot withhold from the state under the equal-footing doctrine.

In addition to holding that Congress could not constitutionally limit the authority of the state to regulate native fishing, the opinion held Sec. 4 of the Statehood Act inoperative on the ground that it was not an "acceptance" of the "offer" made to the United States by Alaska in its constitution (Art. XII, § 12), and further construed Secs. 6(e) and 8(d) of the Alaska Statehood Act as indicating the intent of Congress to transfer control of all fishing, including native fishing, to the State of Alaska.

THE QUESTIONS ARE SUBSTANTIAL

The United States and the State of Alaska are in flat dispute over the regulation of Indian trap fishing.

The major argument of the Supreme Court of Alaska against the validity of the Secretary of the Interior's regulation of native fishing rights is that "the offer to disclaim by the State was conditioned on definition in the act of admission of the right or title to be disclaimed. The response merely repeated the offer to disclaim. It did not comply with the condition. . . ." (App. p. 18a). "We are forced to conclude that no

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owned by its constituent clans one of which was the Kake Clan and one the Hutsnuwu, or Angoon Clan. The Court of Claims in its finding 25 noted that the Tlingit & Haida Indians presently live in a number of native villages which are almost entirely Indian; and that the Hutsnuwu Tribe, Angoon, and the Kake Tribe are each located at the same place as their original villages.

compact as to fishing rights was formed between the State of Alaska and the United States. . . ." (App. p. 25a). So long as this argument stands, the validity of the entire Statehood Act insofar as it does not follow verbatim the Constitution of Alaska is in question.

There is a distinct conflict between the state and federal governments in the administration of Indian affairs in the State of Alaska. Both the Secretary of the Interior and the State Conservation Division are asserting jurisdiction over native fish traps. The state, while accepting federal Indian Service schools, health services, transportation facilities (App. 40a), and the liberal use of federal money for its native population, denies any relationship between the natives and the federal government. The effect of this decision, therefore, is much broader than the rights of appellants herein to maintain fish traps. It goes to the whole problem as between the state and the federal government as to which shall administer Indian affairs.

Section 4 of the Statehood Act is not violative of the equal-footing doctrine. As did the transitional court, the Supreme Court of Alaska based its arguments that the equal-footing doctrine is involved on *Ward* v. *Racehorse*, 163 U.S. 504. It dismissed contentions that *Ward* v. *Racehorse* is out of line with the Supreme Court's many decisions sustaining federal retention of jurisdiction over Indian fishing and hunting,[4] and hoisted itself by its own bootstraps by equat-

[4] *Gaines* v. *Nicholson*, 9 How. 356, 365; *United States* v. *Winans*, 198 U.S. 371, 380-381; *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 198-9; *Tulee* v. *Washington*, 315 U.S. 681, 684-5; *Dick* v. *United States*, 208 U.S. 340, 353; *Ex parte Webb*, 225 U.S. 663, 682, 690; *United States* v. *Sandoval*, 231 U.S. 28, 38, 45-46, 49.

ing the instant case with *Racehorse* on the ground that Section 4 of the Statehood Act being of no effect (as construed by the court), "The act of admission contained no exception in favor or for the benefit of the Indians." App. 30a.

CONCLUSION

This Court should note probable jurisdiction.

Respectfully submitted,

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR APPELLANTS IN NO. 3, ORGANIZED VILLAGE OF KAKE, AND ANGOON COMMUNITY ASSOCIATION

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BRIEF FOR APPELLANTS IN NO. 3, ORGANIZED VILLAGE OF KAKE, AND ANGOON COMMUNITY ASSOCIATION

Opinions Below

The opinion of the court below rendered June 2, 1961, is reported in 362 P. 2d 901, and printed as an Appendix to the Statement as to Jurisdiction filed herein. The opinion of this Court based on a previous appeal from the judgment of the District Court for the District of Alaska in Juneau acting as a transitional state court, directing appellants to proceed with their appeal to the Supreme Court of Alaska for clarification of certain issues, is reported in 363 U. S. 555. The opinion of Mr. Justice Brennan, as Circuit Justice,

upon a temporary restraining order pending the previous appeal, is reported in 80 S. Ct. 33 and 4 L. ed. 2d 34. The opinion of Kelly, J. of the District Court for the District of Alaska appears in the printed record (R. 58-66) and is reported in 174 F. Supp. 500. Supplemental findings of fact appear at pp. 67-69 of the printed record.[1]

Jurisdiction

Jurisdiction of this Court is invoked under § 1257 of the Judicial Code, sub pars. (1), (2). The Supreme Court of the State of Alaska handed down its opinion on June 2, 1961 (Appendix to Statement as to Jurisdiction),[2] affirming the judgment of the District Court for the District of Alaska pursuant to which the complaints of these appellants in No. 3 were to be dismissed. R. 58-66. Written notice of appeal was filed by these appellants July 26, 1961. Statement as to Jurisdiction was filed September 25, 1961. Appellee waived its right to file a motion to dismiss or affirm, and by order of October 23, 1961, this Court noted probable jurisdiction.

The issues in this case were first brought to the attention of this Court by an earlier appeal of appellants herein from the decision of the District Court for the District of Alaska which was then the highest court of the State of Alaska in which a decision could be had. 363 U. S. p. 560. Pending this earlier appeal appellants sought and obtained on July 11, 1959, through Mr. Justice Brennan, acting as Circuit

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[1] The printed record consists of the Transcript of Record (R.), and Supplemental Transcript of Record (S.R.) in Dockets 326-327, O.T. 1959 (now Dockets 2 and 3, O.T. 1961), which served the Supreme Court of Alaska as the record in this case and has been designated as the major part of the record on appeal. The parties have been excused by this Court from printing the balance of the record on appeal, which consists mainly of the opinion of the Supreme Court of Alaska.

[2] Hereinafter designated "Opinion".

Justice, a stay of execution. Thereafter this Court in its opinion of June 20, 1960, stated that "the appeals are within our jurisdiction under 28 U. S. C. § 1257(2), since the court below sustained a statute of the State of Alaska against a claim of unconstitutionality under the United States Constitution." 363 U. S. at p. 557.[3] Appeals had been taken from the decision of the District Court to the newly organized Supreme Court of the State of Alaska; and this Court directed that the appeals be prosecuted to obtain from that (the new Supreme) court enlightenment on "antecedent questions of local law turning in part on appreciation of local economic and social considerations pertinent to the scope of the so-called police power reserved to the State." 363 U. S. p. 561. The Court continued the stay of execution pending final determination of the issues.

Now that the Supreme Court of Alaska has had an opportunity to pass upon the issues and interpret local laws, this Court has before it the appeal from the decision of the Supreme Court of Alaska as well as the appeal from the decision of the transitional District Court for determination on the merits.

Constitutional Provisions, Treaties, Statutes, etc.

The following are quoted in our earlier red Appendix:

Treaty with Russia, Mar. 30, 1867, 15 Stat. 539, 542, Art III.—red App. 1-2.

R. S. § 1839, from Revised Statutes, Provisions Common to All the Territories, 1874.—red App. 2.

Alaska Civil Government Act of May 17, 1884, 23 Stat. 24, 26, § 8, proviso.—red App. 2-3.

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[3] At p. 557 of the decision, this statement was made conditional upon the District Court's having been "the highest court of a State in which a decision could be had" at the time of the appeal. At p. 560 of the decision, the Court stated that this condition had been met.

Alaska Statehood Act of July 7, 1958, 72 Stat. 339, Pub. L. 85-508, §§ 1, 4, 6(e), 7, 8(a), (b), (c) and (d), 12, 13, 14, 15, 16, 17, 18.—red App. 4-14.

Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, Pub. L. 86-70, § 2(a), (b).—red. App. 14-15.

White Act of June 6, 1924, 43 Stat. 464, as amended, from 48 U. S. C. §§ 221, 222, 226, 227, 228.—red App. 15-17.

Constitution of Alaska as ratified by electorate of Alaska April 24, 1956, and effective under the Statehood Act on January 3, 1959: Art. IV, Secs. 1, 2, 3; Art. VIII, Sec. 15; Art. XII, Secs. 12, 13; Art. XV, Secs. 2, 4, 17, 24, 25; Ordinance No. 3.—red App. 17-21.

Session Laws of Alaska 1959, Chap. 17, red App. 22-23; Chap. 95, red App. 26-27.

Proclamations of the President: Jan. 3, 1959, admitting Alaska, 24 Fed. Reg. 81, red App. 29-30.

Press Release, Secty. Interior Seaton, April 7, 1960, and proposed regulations to govern Indian Fishing in Alaska, April 9, 1960, 25 Fed. Reg. 3079, red App. 32-38.

Statement of Fish and Wildlife Service of all fish traps, Indian and non-Indian, operated in Alaska for last five years, dated April 13, 1960, red App. 39.

The following additional matters are quoted in our Appendix to this brief:

Sec. 1505 Judicial Code, 28 U. S. C. § 1505.

Delegation of authority for enforcement of regulations governing Indian fishing in Alaska, Fed. Reg. July 25, 1961, and August 5, 1961, 26 Fed. Reg. 6628, 7064.

Letter of November 3, 1961, Hildegard Thompson, Acting Asst. Commissioner, Bureau of Indian Affairs.

Statement of the Case

The appeal to the Supreme Court of Alaska has in no way changed the facts stated in the complaints and admitted in the motion to dismiss as they were reiterated in the brief filed in the original appeal on April 20, 1960, as follows:

Appellants, Village of Kake and Angoon Community Association, are each an Indian corporation chartered pursuant to the Indian Reorganization Act of 1934 [48 Stat. 984, 988, as amended 49 Stat. 1250, § 17; 25 U. S. C. § 477]; and each has as its membership an entire village of Thlinget Indians. The village of Kake is located at Kake, Alaska,[4] and that of Angoon is located at Angoon, Alaska.[5] S. R. 82-83, 102.

Each appellant operates fish traps, boats, canneries and related equipment which was purchased by the United States in trust for appellants as beneficial owners (S. R. 83, 102-103), although each appellant owes a sizeable debt to the United States arising out of the acquisition and operation of this equipment (S.R. 88, 108). The United States furnishes the funds for operating this equipment (S.R. 84, 103), the operation of which, at the present time and historically, is the only employment available to the members and constitutes the sole source of income for the calendar year for almost all of the members (S.R. 89, 108).

Operation of the traps is essential to the operation of the canneries; appellants do not have available to them an alternative method of maintaining their operations. Closing the canneries would wipe out the economic base of the members, leaving the villages with no means of self-support, the

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[4] Kake is located on the northwest side of Kupreanof Island approximately 100 miles southwest of Juneau.

[5] Angoon is located on the southwest side of Admiralty Island, approximately 60 miles southwest of Juneau.

resulting damage extending to the very fiber of their social, economic and cultural well being. S.R. 88-89; 108.

Although the regulations (24 F.R. 2053) of the Secretary of the Interior of March 7, 1959, prohibited fish traps generally, the prohibition was not applied to native fish traps and some traps of each of the appellants were designated for operation. S.R. 84-85, 104. The Secretary of the Interior based this distinction in treatment of Indian and non-Indian traps on the disclaimer of Indian fishing rights made by the State of Alaska, and on the long-standing supervisory control exercised by the United States for the protection of the Indians. S.R. 85, 104-105.[6]

Notwithstanding appellants were thus authorized to operate, appellee (Governor Egan) both personally and by his agents threatened appellants with seizure of their traps and criminal prosecution of the persons installing and maintaining them, and, on June 15, 1959, actually seized a trap which Kake had set out and arrested the President of Kake's Council and the foreman of the crew which set the trap. S.R. 86, 105-106.

The complaints charged, among other things, that sec. 4 of the Statehood Act and Art. XII, Sec. 12, of the Constitution of Alaska prevented the State from interfering with the control and management of Indian fishing rights held by the Indians or the United States as trustee on their behalf; that the regulations allowing appellants to operate constituted an exercise by the United States of its exclusive powers over the fishing rights of Indians; that the regulation of Indians was exclusively in the United States; and that the state statutes (Constitutional Ordinance No. 3 and Chap. 17, Sess. L. Alaska 1959) were repugnant to the statutes and Constitution of the United States and of Alaska.

[6] See letter to Alaska Area Director set out at length at S.R. 131-132. The disclaimer of Alaska cited by the Secretary of the Interior is Sec. 4 of the Statehood Act, quoted in our red Appendix p. 5.

S.R. 87-88; 106-107. A preliminary and a permanent injunction were prayed. S.R. 91-92; 110-111.

To these complaints appellee immediately moved to dismiss (S.R. 120, 122), asserting exclusive state jurisdiction over the lands and waters involved, that the state has authority to prohibit fish traps for commercial fishing; that the Constitution of Alaska has amended the White Act (of 1924), 48 U.S.C. § 221 et seq. (red App. 15-17); that the federal regulations (of March 7, 1959) are invalid; that the regulation permits a discrimination not permitted under the White Act and conflicts with the Constitution of Alaska, and that plaintiffs have no property right in a fish-trap location. The District Judge dismissed the complaints, relying upon the "equal footing" doctrine.

This Court, in its decision directing appellants to perfect their appeal to the Supreme Court of Alaska, indicated as its reasons for the direction, "While we have before us questions of federal law that are the concern of this Court, their consideration implicates antecedent questions of local law turning in part on appreciation of local economic and social considerations pertinent to the scope of the so-called police power reserved to the State, upon which it would be patently desirable to have the enlightenment which the now fully formed Alaska Supreme Court presumably could furnish." 363 U.S. at p. 561. It sought enlightenment specifically upon "the status of these two Indian communities in relation to the authority of the Secretary of the Interior" and "justification of this legislation under the so-called police power." 363 U.S. at p. 562. It also noted that if 95 SLA 1959, Sec. 1, should be construed to exempt Indians from the prohibition against fish traps, "a constitutional question now appearing on the horizon might disappear." p. 562.

In attempting to supply this Court with the specific information requested in its opinion (363 U.S. at p. 561), the Supreme Court of Alaska had before it only the earlier rec-

ord as printed for this Court—substantially only the complaint and motion to dismiss which admitted the allegations of the complaint. Since apparently the court below felt it required additional facts, it might have remanded the case to the trial court for the taking of additional testimony. Instead, it chose to fill out the record largely by mere *ex cathedra* assertions, thus depriving appellants of any opportunity to cross-examine or offer evidence refuting the statements made. Much that was asserted is not only unsupported, but is contrary to fact; and if these matters were within the judicial knowledge of the court below, then they are within the judicial knowledge of this Court; and we will ask this Court to hold them correctly.[7]

The court below argued (1) that because the waiver of jurisdiction in the enabling Act was not a fulfillment of the waiver of jurisdiction offered in the Alaska Constitution, it was not "accepted" by Congress and so did not become the "solemn compact" referred to and even was of no force and effect as to fishing rights, leaving the State a clear field to regulate Indian fishing rights whatever their nature (Opinion 17a—20a, 25a); (2) that the section of the Alaska Omnibus Act clarifying the jurisdiction of the United States over such fishing rights is not binding upon the State of Alaska because it was not part of the compact (Opinion 20a); (3) that the Indians held no fishing rights to be protected (Opinion 21a-25a); (4) that the State in the proper exercise of its police power must have authority to regulate

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[7] Whatever is law or fact in a state court below is similarly law or fact here, and this Court takes judicial notice to the same extent as the court below—without which, of course, it could not truly review the court below. See *Hanley* v. *Donoghue*, 116 U.S. 1, 6-7. This Court reviews the record in state-court cases to the extent necessary to vindicate a claimed federal right. *Southern Pac. Co.* v. *Schuyler*, 227 U.S. 601, 611. "State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact." *Williams* v. *North Carolina*, 325 U.S. 226, 236.

native fishing (Opinion 25a-29a); (5) that Section 4 of the Statehood Act violates the equal-footing doctrine (Opinion 30a); (6) that appellants have no relationship with the federal government warranting the special protection of Section 4 of the Statehood Act (Opinion 34a-40a); (7) that the language in 95 SLA 1959 had the single purpose of lulling the Secretary of the Interior ("to preserve or restore administrative harmony at a critical period") into the feeling that there was no conflict between the State and the Territory in the interpretation of Section 4 of the Alaska Statehood Act for the purpose of obtaining the Secretary's certificate that the State was ready to undertake its own fish and wildlife regulation (Opinion 47a); and (8) that permitting the fish traps is a denial of "equal footing" on the ground of the new state's ownership of navigable waters and submerged lands (Opinion 48a-54a).

The Department of the Interior has continued to assert its jurisdiction over appellants' fishing rights. On June 2, 1960, 25 F.R. 4865, pursuant to notice of April 9, 1960, 25 F.R. 3079,[8] the Secretary of the Interior promulgated semi-permanent regulations as Part 88, 25 C.F.R. subchap. (H), implementing 25 U.S.C. §§ 2 and 9, 5 U.S.C. § 485 and Section 4 of the Statehood Act. The regulation specifically authorizes the use of fish traps by appellants. It further provides that: "The native Indians and Indian villages of Alaska shall be governed by these regulations in the waters where they apply or by the regulations of the State of Alaska, whichever are least restrictive to their fishing operations." (Section 88.8, red App. 38). As a further step in implementing its policy of permitting appellants to continue operation of fish traps, the Secretary of the Interior delegated his authority to enforce the regulations of the Depart-

[8] The notice is printed pages 34-38 of the red Appendix. The regulation as adopted and incorporated into 25 C. F. R. Part 88 is not substantially different from the regulation as proposed.

ment of the Interior governing the commercial Indian fishing in Alaska to the Director of the Bureau of Commercial Fisheries,[9] who, in turn, in line with his authority redelegated the duty to the Regional Director, Region 5, Bureau of Commercial Fisheries, Juneau, Alaska.[10]

Summary of Argument

In this case this Court can no longer avoid the disagreeable duty of finding legislation unconstitutional—either an act of Congress or Alaska state legislation. Both Alaska and the United States claim jurisdiction—each to the exclusion of the other—to regulate the fishing of appellant Indians. The federal government claims that right by virtue of Sec. 4 of the Alaska Statehood Act, which reserves to the United States "absolute jurisdiction and control" of the fishing rights of Indians until Congress shall otherwise provide. Alaska asserts its own statutes regulating fishing, and says that the provisions of Sec. 4 of the Statehood Act are either invalid or ineffective for several reasons.

The court below holds Sec. 4 of the Statehood Act invalid because of the equal-footing doctrine—that is, Alaska must have the right to regulate its fish and game or the provision of Congress that it be admitted on an equal footing with other states is frustrated. The difficulty is that similar express reservations of federal authority and Indian right in connection with the admission acts of other states have been repeatedly upheld by this Court. The state also claims rights under its police power to regulate fishing by appellant Indians; but it is well established that where the state police power comes into conflict with powers exercised law-

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[9] Order of July 18, 1961 (26 F.R. 6628), Federal Register, July 25, 1961. App. *post* 33.

[10] Order of July 26, 1961 (26 F.R. 7064), Federal Register, August 5, 1961. App. *post* 34.

fully by the federal government, the state police power must give way. The court below holds that the Alaska Constitution "offered" to disclaim Indian fishing rights only as those rights were "defined" in the act of admission, and that the act of admission did not specifically define the rights, so that there was no literal acceptance of the state's offer. But if a formal contract be necessary in these circumstances, it was effected pursuant to Sec. 8(b) of the Statehood Act, which required ratification of Sec. 4 by the people of the state and without which the entire act would have fallen.

The court below holds Sec. 4 ineffective. But Sec. 4, in reserving jurisdiction over Indian fishing, is not meaningless; Congress did not adopt it as mere idle ceremony; appellant Indians were fishing there at the time, and Congress reserved to its own jurisdiction the regulation of that fishing. The court below says there are not now and never have been Indians in Alaska as that term is used in federal Indian law; but the allegations of the complaint, uncontested affidavits, public records and notorious historical and ethnological fact all show beyond question that appellants are Indians quite as much as are Indians elsewhere. The court below holds that appellants had no right or title in their fishing. But these Indians were fishing when the Statehood Act was passed and they had always fished, from time immemorial. The small remnant of their aboriginal fishing rights is nonetheless a *right* protected by federal law whether or not it is recognized by formal treaty or agreement with the particular tribe. These fishing rights have been recognized for many years by the Department of the Interior; and its efforts in that respect ultimately led to Sec. 4 of the Statehood Act now before the Court.

Accordingly, Sec. 4 of the Statehood Act validly reserves jurisdiction in the federal government, and the state's acts

conflicting with that jurisdiction must fall under the Supremacy Clause—although they would also fall under the contract-impairments clause, since the compact between the federal government and the people of the state pursuant to Secs. 4 and 8(b) of the Statehood Act actually is a contract protected against state impairment.

ARGUMENT

I. Section 4 of the Statehood Act Is Valid and Effective

A. Section 4 of the Statehood Act is Valid

1. Section 4 of the Statehood Act is Valid Notwithstanding the Equal-Footing Doctrine.—The court below holds (Opinion 49a, 53a) that to deny Alaska ownership of the soil beneath the navigable inland waters which are involved here would be violative of the equal-footing doctrine, as would be withholding sovereignty over the inland waters, citing *Pollard* v. *Hagan*, 3 How. 212, 228-229; *Shively* v. *Bowlby*, 152 U.S. 1, 26; and *United States* v. *Texas*, 339 U.S. 707, 716.

Pollard v. *Hagan* deals with the broad language of agreement under which the state was admitted. 3 How. at p. 223—

> "When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, *except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States,* for the temporary purposes provided for in the deed of cession and the legislative Acts connected with it. *Nothing remained in the United States, according to the terms of the agreement, but the public lands.* And, if an express stipulation had been inserted in the agreement, granting the municipal

right of sovereignty and eminent domain in the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted." (Italics added.)

Yet here we have the express reservation of rights and jurisdiction in the United States where jurisdiction is independently sustained under the federal Constitution against the very contention of the *Pollard* case. *United States* v. *Sandoval*, 231 U.S. 28, 38 and cases cited. See also *Ex parte Webb*, 225 U.S. 663, 669-70. Similarly, *United States* v. *Holt State Bank*, 270 U.S. 49, cited by the court below, Opinion 48a, footnote 100, does not hold that the federal government *could* not have reserved the lake for the Indians, but only that it *did* not. To the contrary, it states that the federal government can create rights in tidelands and such rights are not cut off by statehood. pp. 54-5. *Shively* v. *Bowlby* and *United States* v. *Texas* merely typify the rule of the *Pollard* case that if the United States still owns them, the state upon admission takes title to the tidelands.

In addition to tidelands, the doctrine of the tidelands cases covers beds of lakes and navigable waterways. Yet, the reservation of Indian fishing rights and jurisdiction has been honored as to each. See *Seufert Bros.* v. *United States*, 249 U.S. 194, 198-9; *Tulee* v. *Washington*, 315 U.S. 681, 684-5. Thus, the tidelands cases do not support to any extent the unconstitutionality of Section 4 of the Statehood Act.

The court below (Opinion 30a-31a) places heavy reliance upon *Ward* v. *Race Horse*, 163 U.S. 504. That case was aberrant; and this Court has flatly held to the contrary in many cases since. That case held that Wyoming could punish an Indian for violating a state game statute in killing

seven elk off his reservation in reliance on a claimed treaty right to hunt on "unoccupied lands of the United States." Prior to *Ward* v. *Race Horse*, the reservation of lands to which Indians had had original title had been respected (*Gaines* v. *Nicholson*, 9 How. 356, 365); and following *Ward* v. *Race Horse*, the Court immediately returned to that earlier doctrine in *United States* v. *Winans*, 198 U.S. 371, 380-81, which held that although the white man felt he could make better use of the fishing right than the Indian,[11] the United States could create rights when it held the territory which would be binding upon the state after admission and that the rights conferred upon the Indians are not subordinate to the powers acquired by the state upon its admission into the Union upon an equal footing. This view has been consistently followed by this Court since, including further cases of state interference with Indian fishing. *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 198-9; *Tulee* v. *Washington*, 315 U.S. 681, 684-5. Exclusions of state jurisdiction over Indians by admission acts have uniformly been sustained as well in other situations against contentions based on the equal-footing doctrine. *Dick* v. *United States*, 208 U.S. 340, 353; *Ex parte Webb*, 225 U.S. 663, 682, 690; *United States* v. *Sandoval*, 231 U.S. 28, 38, 45-46, 49.[12] For the equal footing doctrine is of no greater dignity than the Congressional power to regulate commerce with the Indian tribes. *Dick* v. *United States*, 208 U.S. at p. 353. In 1954 this Court declined an opportunity to review an opinion of the Supreme Court of Idaho commenting instructively on

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[11] "It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in common." p. 382.

[12] Counsel who had convinced the Court in *Ward* v. *Race Horse* by this time had ascended this Bench and wrote the opinion in the *Sandoval* case, leaving no doubt as to the power of the United States or the fact that such an exclusion in an admission act (New Mexico) did not offend equality with the other states.

the deviation in *Ward* v. *Race Horse*. *State* v. *Arthur*, cert. den. No. 552, O.T. 1953, 347 U.S. 937, denying review of 74 Ida. 251, 261 P. 2d 135, 138-139.

At the same time, *Ward* v. *Race Horse* is distinguishable on its face. This Court specifically noted (163 U.S. at p. 506) that Wyoming was admitted on an equal footing with the original states in all respects whatever "but in this act there was no exception, as there had been in the territorial act, in favor of the Indians." The lack of reservation of rights of and jurisdiction over Indians was emphasized and reemphasized by the Court. p. 515. The distinction from the present case, with its express reservation of rights and jurisdiction, is plain.

2. **The State Police Power Does Not Render Section 4 of the Statehood Act Invalid.**—The court below based the control of fishing here exercised by Alaska on the police power. Opinion 25a-28a. The court rejected the contention that Section 4 of the Statehood Act could override the state exercise of police power—which means that the "absolute jurisdiction and control of the United States" over Indian fishing rights which was retained by Section 4 of the Statehood Act yields to the state police power, if the state court is correct.

Of course, the rule is precisely the reverse. While the state may have a police power, it may not exercise it if it collides with the federal Constitution or an act of Congress. "But where there is such a collision, the action of a State under its police power must give way by virtue of the Supremacy Clause." *Morris* v. *Jones*, 329 U.S. 545, 553. The rule was long ago stated succinctly in *Jacobson* v. *Massachusetts*, 197 U.S. 11, 25:

> "A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General

Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures."

3. **Section 4 of the Statehood Act Is Not Invalid as an Inadequate Acceptance of a Conditional Waiver in the State Constitution.**—The Supreme Court of Alaska refers in terms of contract law to the compact between the state and the United States pursuant to Section 12 of Article XII of the Alaska Constitution and Section 4 of the Statehood Act, calling the constitutional disclaimer an "offer" and Section 4 of the Statehood Act a "response." Opinion 16a-17a. Since the state "offered" to disclaim property, including fishing rights, held by or for any Indian, Eskimo, or Aleut, or community thereof, "as that right or title is defined in the act of admission", it holds that Section 4 did not quite come up to the offer because it failed to define the right or title in the act of admission. Opinion 18a.

But if Section 4 of the Statehood Act in order to have vitality can be considered only as a contract with Alaska, that contract was plainly reached whether or not Section 4 accepted the state's "offer." For Section 8(b) of the Statehood Act specifically provided for a vote of the people of Alaska on the proposition whether the provisions of the Statehood Act "reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people." Red App. 8-9. If not "*fully consented to*", the Statehood Act was ineffective; Alaska could not be admitted. If consented to, "the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly." Red App. 9. As the proclamation admitting the state shows (red App. 29), the people of Alaska by their

vote agreed to this exclusive federal jurisdiction; and if there were any infirmity as between Section 12 of Article XII of the Alaska Constitution and Section 4 of the Statehood Act, the compact was reached with Alaska through its people and their vote to accept Section 4.

B. Section 4 of the Statehood Act is Effective

1. **Section 4 is Not Meaningless.**—Section 4 says there "shall be and remain under the absolute jurisdiction and control of the United States" any "lands or other property (including fishing rights)" which may be held by or in trust for any Indians. The court below in effect holds this meaningless since "no fishing rights were held by or for natives at the time." Opinion 25a.

The phrase "including fishing rights" received special consideration when the Statehood Act was under consideration. See H.Rept. No. 624, 85th Cong., 1st Sess., p. 31; S.Rept. No. 1163, 85th Cong., 1st Sess., at p. 47. Its inclusion had been questioned by the Department of Justice, so it cannot be said that this phrase was included by inadvertence. It was again considered in connection with the Alaska Omnibus Act. In an analogous situation of statutory construction, this Court said (*Mid-Northern Oil Co.* v. *Walker*, 268 U.S. 45, 48):

> "It fairly cannot be supposed that Congress would indulge in the altogether idle ceremony of enacting a law to save rights which, being in no way challenged or affected, stood in no need of being saved."

Neither can it be supposed that Congress would indulge in the altogether idle ceremony of enacting a law to save rights which did not exist. These Indians were fishing there at the time; both Congress and the incipient state knew it. The rights under which they were fishing were, then, plainly reserved to exclusive federal jurisdiction.

2. Appellants are "Indians" Subject to Regulation by Congress.—A main ploy of the court below to escape the reach of federal jurisdiction over appellants was an attempt to make it appear that there are no Indians in Alaska so that appellants are in no respect Indians. Thus, the court says (Opinion 34a) that "There are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law."

This flies squarely in the face of allegations of the complaints: "That said village is located in Kake, Alaska; that said corporation is a membership corporation whose membership is that of an entire village, presently numbering 400 people; that the members thereof are of the Thlingit Indian Tribe; . . ." S.R. 83. (Same allegation as to Angoon, S.R. 102; affidavits supporting S.R. 93, 116.) With this also is to be compared the language of the federal constitution and bylaws of the Organized Village of Kake handed up to the Court at the previous argument: "We, the Kake Indians of Alaska, an Indian band or tribe . . ." approved by the Secretary of the Interior November 17, 1947; similarly, the corporate charter of Kake: "Whereas, the Kake Indians of Alaska, an Indian band or tribe, seek to organize . . . [under the Indian Reorganization Act of 1934]." The Angoon charter refers to Indians having a common bond of residence in the neighborhood of Angoon.

The status of these Indians as tribal Indians is notorious ethnological fact anyway: *Tlingit & Haida Indians of Alaska* v. *United States*, — C. Cls. —, 177 F. Supp. 452 (Oct. 7, 1959). In Finding 25, p. 48 of the pamphlet opinion, the Court of Claims holds: "The following are the names of the modern communities where the Indians of the Tlingit tribes live: . . . 6. *Hutsnuwu* tribe: Angoon (located at the same place as the original village); . . . 8. *Kake* tribe: Kake (located at the same place as the original village) . . .

Angoon, Kake, . . . are the native villages." See the map which accompanies the findings, Pl. Ex. 169, at p. 455 of 177 F.Supp. Cf. Compilation of Material Relating to the Indians of the United States and the Territory of Alaska pursuant to H.Res. 66, 81st Cong., 2d Sess., June 13, 1950, Serial No. 30, pp. 20, 22—*e.g.*, p. 22, "*Kake* a Tlingit Indian Tribe located on Kupreanof Island in southern Alaska." To the same effect, H.Rept. No. 2503, 82d Cong., 2d Sess., pp. 621-2. See *Swanton, The Indian Tribes of North America,* Bur. Am. Ethnology Bull. 145 (1952), pp. 540-3. We may ask, as to this assertion of the court that there are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law whether, indeed, the United States has deluded itself in establishing at Juneau one of its ten major area offices of the Bureau of Indian affairs. See Congressional Directory, 87th Cong., 1st Sess. (April, 1961), p. 479.

The Supreme Court of Alaska also asserts, for instance, that "Neither the residents of Kake and Angoon nor their Tlingit ancestors have ever been treated as wards of the United States." (Opinion 36a). And, ". . . Congress has not historically exercised a fostering care over the communities of Kake and Angoon, nor over their Tlingit ancestors, nor in fact over any of the Indians of Alaska." (Opinion 38a). Now, it is true that these Indians were impoverished by the white man who had found them "industrious and prosperous, and the accumulation of surplus wealth was a basic feature of their economy", *Tlingit and Haida Indians of Alaska* v. *United States,* 177 F.Supp. 452, 456. But it is flatly not true that the United States regards these people in either fact or law as differing from other Indians in their special relationship to the federal government. Thus, the complaints allege that plaintiffs have been organized and chartered by the federal government, as we showed

just above; that the United States Department of Interior has authorized the institution of this suit and the retention of counsel (whose selection and compensation are subject to the approval of the Secretary of the Interior). S.R. 82-83, 102. The Secretary of the Interior has referred in this case to "the long-standing supervisory control exercised by the United States for the protection of the Indians, . . ." S.R. 85, 105, 132.

Title to appellants' canneries and even the Corps of Engineers' permits authorizing them to maintain fish traps is in the name of the United States as trustee for appellants. S.R. 83, 102, 133-37. It is unchallenged that ". . . the earnings of the Kake Cannery are handled under the supervision of the United States" (S.R. 94), and that ". . . the total indebtedness of Kake to the United States is presently $781,872.33 [in 1959]." S.R. 99. We note also "That the present value of said properties is $377,218.45" (S.R. 99)[13] — which would seem to be fairly substantial "fostering care" which the court below says has not historically been exercised.

While denying United States guardianship for the sake of trying to close up appellants' fisheries, Alaska is all too willing to accept funds under the Johnson-O'Malley Act of April 16, 1934, 48 Stat. 596, 25 U.S.C. § 452, for the education of children at Kake and Angoon by reason of their ward status in relation to the federal government. See letter of Hildegard Thompson, November 3, 1961, attached as an Appendix to this brief, *post* p. 35.[14]

The 1936 extension of the Indian Reorganization Act of 1934 to Alaska was not the federal government's first rec-

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[13] For similar facts relative to Angoon see S. R. 113-117.

[14] Before the territory took over the schools at Kake and Angoon with the aid of federal funds available to local school districts for the education of Indians, the schools were owned and operated by the Alaska Native Service. See letter, *supra*, Appendix *post* 35.

ognition that it owed a special duty to the Tlingits as its wards. The 1867 Treaty by which the United States acquired Alaska from the Russians made provision that the uncivilized natives should be treated by the United States as it treated its own aboriginees. (Art. III, red App. 1-2).

The Court of Claims in *Tlingit and Haida,* (177 F.Supp. 452 at 462) found that "The fact that the United States never attempted to make treaties with these Indians is not significant since shortly after the acquisition of Alaska from Russia in 1867, Congress enacted the Act of March 3, 1871, 16 Stat. 544, 566, prohibiting any further dealings with Indians by treaty." The handbook on *Federal Indian Law,* p. 936, offers an additional explanation: "This was primarily because the reasons which were responsible for treaty-making by the Federal Government with the American Indians were not present in Alaska, where there was plenty of land and little danger of serious hostilities."

In 1873, Sections 20 and 21 of the Trade and Intercourse Act, prohibiting liquor traffic in Indian country and with the Indians, were extended to include Alaska.[15]

Beginning in 1905 and continuing to the present day, Congress has appropriated funds earmarked for education of the natives of Alaska (Act of January 27, 1905, 33 Stat. 616, 619, Sec. 7), and such funds are still used by the Department of the Interior for the education of the Indians of Kake and Angoon. The 1905 Act made these Indians eligible to attend Indian Boarding Schools in the states.

The hunting and (fishing rights) of the Alaskan natives were generally recognized by Congress throughout the years. The Act of June 7, 1902, 32 Stat. 327, as amended by

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[15] Act of June 30, 1834, 4 Stat. 729, 732-33; Act of March 3, 1873, 17 Stat. 510, 530. Failure of the government to enforce the prohibition (*Fed. Indian Law,* p. 936) was not a denial of the need of these Indians for the protection contemplated, but merely another instance of the government's neglect of these distant wards.

the Act of May 11, 1908, 35 Stat. 102, made exceptions to the hunting laws on behalf of the natives and others for subsistence needs.[16] This right to take animals, birds or game fish out of season when other food was not available was continued for the benefit of the natives, prospectors and travelers by Act of January 13, 1925, 43 Stat. 739, 744, § 10, 48 U.S.C. § 198, as amended February 14, 1931, 46 Stat. 1111, and Act of June 25, 1938, 52 Stat. 1169, 48 U.S.C. § 205. The Act of January 13, 1925, 43 Stat. 739, § 11, provided for exemption for natives or half-breeds who had not severed tribal relations from the resident hunting and trapping license. That explorers and sometimes settlers living among the natives were accorded these same privileges did not detract from the fact that the privileges were extended to the natives as natives and not as citizens of the territory. *United States* v. *Winans,* 198 U.S. 371, 381.

The government did not affirmatively create reservations at Kake and Angoon, though through the protections from interference it accorded by statute and regulation, it may be said negatively to have done so. The policy of Congress in a series of acts beginning in 1884 of protecting the lands of the natives in actual occupation had the effect of "reserving" to them their villages—at least their main villages as of 1884—which appellants still occupy.[17] The 1936 Act extending the benefits of the Wheeler-Howard Act to Alaskan

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[16] "Nothing in this Act shall * * * prevent the killing of any game animal or bird for food or clothing by native Indians or by Eskimo or by miners, explorers, or travelers on a journey when in need of food * * *." Apparently the natives were not bound by the condition "when in need of food." Act of June 7, 1902, 32 Stat. 327, § 1. This was amended by Act of May 11, 1908, 35 Stat. 102, § 1, to read that "Nothing in this Act shall * * * prevent the killing of any game animal or bird for food or clothing at any time by natives, or by miners or explorers, when in need of food; * * *."

[17] Act of May 17, 1884 (23 Stat. 24, 26, Sec. 8 (red App. 2-3)). Act of March 3, 1891, 26 Stat. 1095, 1100, Sec. 14. *Cf.* Act of May 14, 1898, 30 Stat. 409, 413, Sec. 10.

natives also provided a method for the Department of the Interior to enlarge these reservations.[18] The one reservation in southeastern Alaska established under the 1935 Act was struck down on the grounds that the Secretary of the Interior had not conformed factually or procedurally with the terms of the law.[19] The court did, however, assert that the Haida Indians involved were ward Indians, saying (p. 699): "... equality only awaits the emancipation of the Indian from wardship restriction." This failure and the extreme opposition that developed to the creation of any reservations in southeastern Alaska[20] put an end to any further efforts along that line.

Citizenship of appellants is irrelevant to their status as Indians subject to federal regulation. As the Court stated in *Winton* v. *Amos*, 255 U.S. 373, 391-92, "It is thoroughly established that Congress had plenary authority over the Indians and all their tribal relations and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency; and

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[18] Act of May 1, 1936, 49 Stat. 1250: "Sec. 2. That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use or occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 17 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said territory. . . ."

[19] *United States v. Libby, McNeil & Libby*, 107 F.Supp. 697 (Alaska, 1952).

[20] In *United States* v. *Libby, McNeil & Libby, supra*, p. 699, the court said: "Viewing this controversy in historical perspective it is no exaggeration to say that nothing since the purchase of Alaska has engendered so much ill feeling and resentment as the Department's reservation policy and its encouragement of aboriginal claims." For several years thereafter, bills were introduced in Congress forbidding the creation of reservations in Alaska. See *e.g.* S.J. Res. 162, 80th Cong.; H.J. Res. 269, 80th Cong.; S. 363, 81st Cong.

it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it." *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 311-16; *Hallowell* v. *United States*, 221 U.S. 317, 324; *Creek County* v. *Seber*, 318 U.S. 705, 718.

3. **Appellants Have "Rights" Referred to in Section 4 of the Statehood Act.**—The Supreme Court of Alaska (Opintion 24a) stated that "Our search leads us to the belief that no act of Congress had established any 'right or title' in fishing rights which were 'held' by or for natives at the time the compact was made. Whatever hunting or fishing privileges Congress has extended to natives in the past have been equally applicable to the white residents . . . [Opinion 25a]. We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States . . . This is because no fishing rights were defined, as required by the condition in the offer to disclaim, and no fishing rights were 'held' by or for natives at the time."

In the foregoing statement, the court apparently feels that rights in the natives have to be affirmatively created by act of Congress. This ignores that these Indians have rights which they have exercised since before the white man came to Alaska. The small remnant of these rights they seek here to protect. The fact that they have always been fishermen is recognized not merely by appellee but is shown by the recent case of *Tlingit and Haida Indians of Alaska* v. *United States*, — C. Cls. —, 177 F. Supp. 452, 456-457 (1959).

The rights are legal rights, not merely moral ones. From the outset of our national dealings with the Indians, the natives of this country have been "admitted to be the rightful occupants of the soil, with a **legal** as well as just claim to retain possession of it." *Johnson* v. *M'Intosh*,

8 Wheat. 543, 574 (1823). "Whether . . . a reservation . . . or unceded Indian country, . . . the Indians' **right** of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Minnesota* v. *Hitchcock,* 185 U.S. 373, 388-9 (1902). The Court has referred to the Indians' ". . . unquestioned **right** to the lands they occupy, until . . . extinguished by a voluntary cession to our government; . . ." *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 17 (1831). "Indians have **rights** of occupancy . . . as sacred as the fee-simple, absolute title of the whites; . . ." (*id.,* p. 48). They have ". . . a **right** to all the lands within [their territorial] boundaries, which is not only acknowledged, but guaranteed by the United States" *Worcester* v. *Georgia,* 6 Pet. 515, 557 (1832). Indians hold lands " . . . **owning** them by a perpetual **right** of possession in the tribe . . . [which, though fee was in the crown] could not be taken without their consent . . . their **right** of occupancy is considered as sacred as the fee-simple of the whites." *Mitchel* v. *United States,* 9 Pet. 711, 745-746 (1835). The Court has spoken of their ". . . unquestionable **right** to the lands they occupy, until . . . extinguished by a voluntary cession. . . . This perpetual **right** of occupancy, with the correlative obligation of the government to enforce it. . . ." *Leavenworth Railroad* v. *United States,* 92 U.S. 733, 742 (1875). It has spoken of the ". . . **right** of Indians to their occupancy [which] is as sacred as that of the United States to the fee, . . ." *United States* v. *Cook,* 19 Wall. 591, 593 (1873). It has said that "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian **right** of occupancy . . . " *United States as Guardian, etc.* v. *Santa Fe Pacific Railroad Co.,* 314 U.S. 339, 345 (1941), and *Cramer* v. *United States,* 261 U.S. 219, 227 (1923). "It was the

usual policy not to coerce the surrender of lands without consent and without compensation. . . . Something more than sovereign grace prompted the obvious regard given to original Indian title." *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 48 (1946).

The legal position of a tribe or a clan of Indians cannot well be understood without the realization that it constitutes a government—not merely aboriginally, but now—not with only property rights, but with governmental functions recognized by the Indian Reorganization Act (under which these appellants are organized, S.R. 82-83, 102) itself. But the fact that these are political entities, owing, when the white man first came to their country, no allegiance to the United States, has been the Achilles heel of the Indian tribes of this country.

Though their legal rights are plain beyond all cavil, they are governments; the dealings of the federal government with their legal rights is in the political field. No more than could the Russian Government on a trespass by the United States could the Indian tribes come to this country's courts for redress. The Indians could appeal only to the political branch, only to the political conscience of our country. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565-566 (1903).

And when that conscience has heeded the natives' appeal, as has so frequently been the case with the legislative branch of our government (as distinguished from the executive, whose representatives so often have sided with the pioneer in his conflicts with the aborigine), the courts are freed from the political restraint and bound to protect the native's existing rights. While the student may express wonder that the courts call a violation of "unrecognized" title (as distinguished from land held pursuant to treaty or statute) a mere trespass as distinguished from a taking under the 5th Amendment entitling the aboriginal owner to

just compensation,[21] and while the student may wonder why a treaty right may, under § 1505 of the Judicial Code (Appendix, *post*), collect just compensation immediately upon a taking, while the Indian-title right must await still further political permission from Congress,[22] the fact that in any

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[21] For a *tortious* taking of private property for public use there is no right to just compensation under the Fifth Amendment. *United States* v. *Goltra*, 312 U.S. 203, 208 (1941). But a treaty title of Indians, despite the political bar to suit, gives the right (enforceable when Congress gives permission to sue) to just compensation under the Fifth Amendment. *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 115-116 (1938); 299 U.S. 476, 495-496 (1937). On the other hand, if the rights involved are aboriginal rights not politically recognized by the United States through treaty or statute—that is, which have not become a contract right of, or a guaranty by the United States to, the Indians, then a taking of title by the United States, and apparently with or without the authorization of Congress, is tortious and does not require just compensation under the Fifth Amendment, *i.e.*, results in a judgment for only the value at time of taking, without any damages for delay in making payment. *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49. Note that the *Alcea* case cites the *Goltra* case (tortious taking) as authority for this distinction.

[22] A taking of recognized Indian title—the contract right referred to in note 21, just above—is one "arising under or growing out of any treaty, agreement or act of Congress." *United States* v. *Creek Nation*, 295 U.S. 103, 108 (1935); *Shoshone Tribe* v. *United States*, 299 U.S. 476, 496 (1937); *Seminole Nation* v. *United States*, 102 C. Cls. 565 (1944). Therefore it comes under the express language of § 1505 of the Judicial Code (Appendix, *post*); the taking gives a right of immediate action for just compensation. Not so with Indian title which has not been recognized; while it affords the same basis for recovery if Congress waives the political bar and permits suit (first *Alcea—United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40 (1946); cf. second *Alcea*, above, n. 21) this Court squarely held that a tribe cannot recover for its taking under the language of § 1505 of the Judicial Code. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955). While the latter decision is easy enough to understand as relating to a taking not "arising under the Constitution, laws or treaties of the United States," since no treaty guaranteed the right that was taken, still the Court's opinion is not instructive as to why the right is not a claim "which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group," also embraced by that section; for if, as the cases indicate, the bar to suit is the political bar, then an Indian tribe just like any other property-owning corporation might have been thought entitled to sue for its property once that bar has been removed.

event there is a right furnishing adequate basis for judicial recognition is left undoubted by the cases.[23] And here that political conscience has heeded the appeal. In Section 4 of the Statehood Act Congress expressly required a disclaimer by Alaska not only of all right and title to property (including fishing rights) held by or for any Indians, but also an agreement that there is retained by the United States absolute jurisdiction and control of that property (including fishing rights). No matter how or when the United States might take the remaining fishing rights of appellants, or how or when or to what extent it might make compensation for their taking, the fact remains that the fisheries is a property right of appellants, and until and unless interfered with by Congress, Alaska is powerless to terminate it.

These fishing rights have been recognized for many years by the Department of the Interior.—In 1942, the Solicitor of the Department of the Interior handed down an opinion on the question "Whether Indians of Alaska have any fishing rights which are violated by control of particular trap sites by non-Indians under departmental regulations, and whether such rights require or justify the closing down of certain trap sites or the allocation of trap sites to Indian groups or other remedial action by the Secretary of the Interior." 57 I.D. 461. The question was answered in the affirmative, the Solicitor holding that the Alaska Indians had aboriginal possessory rights within the meaning of *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339. He found that whatever possessory rights the Alaskan Indians enjoyed in the waters of submerged lands were not impaired under Russian rule and were not divested by the United States, p. 464. He noted "in the first place, it must be recognized that the mere fact that the common

[23] First and second *Alcea*, discussed in notes 21 and 22 just above.

law does not recognize several rights of fishery in ocean waters or rights in land below the high water mark does not mean that such rights were abolished by the extension of American sovereignty over the waters in question. It is well settled that Indian legal relations, established by tribal laws or customs antedating American sovereignty are unaffected by the common law." Citing *Ex parte Tiger*, 2 Ind. T. 41, 47 S.W. 304 (1898), and *Delaware Indians* v. *Cherokee Nation*, 38 C. Cls. 234 (1903), modified 193 U.S. 127, as well as *Damon* v. *Hawaii*, 194 U.S. 154, and *Carter* v. *Hawaii*, 200 U.S. 255.

In discussing the effect of the White Act limitation against exclusive rights of fishery the Solicitor noted that it "clearly refers to grants under the statute and not to rights existing long prior to the statute." p. 468.[24]

Until the decision of the Court of Claims in *Tlingit & Haida Indians* v. *United States*, 177 F. Supp. 452, the issue whether the natives of Alaska retained any aboriginal rights remained in doubt.[25]

Notwithstanding the doubt, the Department of the Interior continued to assert and try to protect the fishing rights of the natives. See *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, *United States* v. *Libby, McNeill & Libby*, 107 F. Supp. 697 (D. Alaska, 1952). It sponsored legislation which would have caused the commercial canneries to give up trap sites within the aboriginal areas of the various clans to those clans or villages. S. 1446, H.R. 3859, 80th

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[24] *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, which has been cited to the contrary, when carefully read stands only for the proposition that White Act sanctions could not be used to protect such pre-existing rights. As a matter of fact, *Hynes* v. *Grimes* held that the Secretary of the Interior could reserve waters to the Indians irrespective of the pre-existing rights, but that the reservation could not be protected by White Act sanctions.

[25] *Miller* v. *United States*, 159 F. 2d 997, 1002. The court in *Tlingit and Haida* found the rights exist. p. 464.

Cong. Approaching the problem differently, the Department, in March, 1948, aided Angoon in the acquisition of the cannery to which the trap sites in its aboriginal area were connected (S.R. 102, 103) and in 1950 did the same for Kake (S.R. 83.)

That policy was continued with the insertion into the Statehood Act, Sec. 4, of the parenthetical phrase "fishing rights". And Congress was assured by the Secretary of the Interior that "the Bureau of Indian Affairs of the Department of the Interior will continue its trusteeship for these [Indians, Eskimos and Aleuts] natives after statehood." Hearings on S.49, 85th Cong., Committee on Interior and Insular Affairs of the Senate, p. 101.

II. Alaska Law Regulating Appellants' Fishing Must Yield to Section 4 of the Statehood Act

Federal regulations say that appellants may fish some of their trapsites. Alaska law says they may not fish any of them. One or the other must yield.

Section 4 of the Statehood Act says that fishing rights of Indians shall be "under the absolute jurisdiction and control of the United States until disposed of under its authority". Unless this Court shall hold that provision unconstitutional, then, under the Supremacy Clause, the state law must yield. Cf. *Irvine* v. *Marshall,* 20 How. 558, 562-63 (1857). And it has been repeatedly held that the reservation to Indians of rights such as these is perfectly valid and within the power of Congress. We reviewed the cases in discussing the equal-footing doctrine; see *United States* v. *Winans,* 198 U.S. 371, 380-81 (1905); *Seufert Bros. Co.* v. *United States,* 249 U.S. 194, 198-99 (1919); *Tulee* v. *Washington,* 315 U.S. 681, 684-85 (1942); *Dick* v. *United States,* 208 U.S. 340, 358 (1908); *Ex parte Webb,*

225 U.S. 663, 682, 690 (1912); *United States* v. *Sandoval*, 231 U.S. 28, 38, 45-6, 49.

The Supremacy Clause aside, the hostile state legislation would fall as an attempt to impair the obligations of contract—the contract being the compact entered into between the United States in Section 4 of the Statehood Act and the people of Alaska through their express vote pursuant to Section 8(b) of the Statehood Act. *Green* v. *Biddell*, 8 Wheat. 1, 92-93 (1823); *The Kansas Indians* 5 Wall. 737, 751, *et seq.* (1866), as reviewed in *Coyle* v. *Smith*, 221 U.S. 559 at pp. 578-79.

Conclusion

The judgment should be reversed and, pursuant to Section 14 of the Statehood Act (red App., p. 12) and Article XV, Section 17 of the Alaska Constitution (red. App., p. 20), the case should be remanded to the Supreme Court of Alaska.

Respectfully submitted,

JOHN W. CRAGUN,
Counsel for Appellants in No. 3.

FRANCES L. HORN,
WILKINSON, CRAGUN & BARKER,
Of Counsel.

APPENDIX

Sec. 1505 of the Judicial Code (28 U.S.C. § 1505) was derived from § 24 of the Indian Claims Commission Act (Act of August 13, 1946, 60 Stat. 1049, 1055), according the first general authority to Indian tribes to sue the United States on such of their claims as might arise after the date of that act. In its present form it was adopted with the Judicial Code of 1949, and reads:

§ 1505. Indian claims

The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

26 F. Reg. 6628, July 25, 1961

Fish and Wildlife Service

DIRECTOR, BUREAU OF COMMERCIAL FISHERIES

Commercial Indian Fishing in Alaska; Notice of Delegation of Authority To Enforce Regulations

SECTION 1. *Delegation.* The Director of the Bureau of Commercial Fisheries is authorized, subject to the provisions of section 2 of this order, to exercise the authority delegated by the Secretary of the Interior in Secretary's Order No. 2857 to enforce the regulations of the Department of the Interior governing the commercial Indian fishing in Alaska set forth in 25 CFR Part 88, in those areas in the State of Alaska in which he is requested to do so by the Commissioner of Indian Affairs.

SEC. 2. *Redelegation.* The authority delegated by section 1 of this Order may be redelegated in writing to the Regional Director, Region 5 of the Bureau of Commercial Fisheries. The redelegation of this authority shall be published in the FEDERAL REGISTER.

Dated at Washington, D.C., July 18, 1961.

CLARENCE F. PAUTZKE,
Commissioner of Fish and Wildlife.

26 F. Reg. 7064, August 5, 1961

Fish and Wildlife Service

Commercial Indian Fishing in Alaska

Notice of Delegation of Authority to Region 5 Director to Enforce Regulations

The regulations issued herein are based on authority of the Director, Bureau of Commercial Fisheries, to issue such regulations. The requirements herein set forth apply as a portion of the directives system of the Bureau. Such material follows the format of the Bureau's Manual and is to be included therein.

Series 5000—Resource Development

* * * * * * *

5491. *Commercial Indian Fishing in Alaska.*

549.1. *Delegation of Authority.* The authority included in the Federal Register of July 25, 1961 to enforce regulations for commercial Indian fishing in Alaska, is hereby delegated to the Regional Director, Region 5, Bureau of Commercial Fisheries, Juneau, Alaska.

Dated at Washington, D.C., July 26, 1961.

Donald L. McKernan,
Director,
Bureau of Commercial Fisheries.

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
Washington 25, D.C.

November 3, 1961.

Wilkinson, Cragun, and Barker,
1616 H Street, N.W.,
Washington, D. C.

GENTLEMEN:

We are pleased to provide you the information requested by telephone November 1, 1961, concerning Johnson-O'Malley Act assistance to the public school system at Kake and Angoon, Alaska.

Both schools were constructed for education of native children, Kake in 1891 and Angoon in 1920. Both were operated by the Federal Government until their transfer to State jurisdiction. According to our records the facilities at Kake were transferred under a Use Permit No. 41-14 effective July 1, 1947. Johnson-O'Malley Act assistance was furnished the district beginning in 1960 to enable the school district to develop high school grades. The funds are provided under the State Johnson-O'Malley Act contract.

The independent school district at Angoon, Alaska, took over the operation of the Federal school at the beginning of the school term in 1954. Johnson-O'Malley Act assistance has been furnished the district each year since that time in the absence of a local tax base to support local share of financing the public education program involving the native children. The contract was made directly with the school district until 1958 when this district was included in the Johnson-O'Malley Act plan developed with the Territory. This plan was approved later by State officials following Alaskan statehood.

If we can be of further assistance, please advise.

Sincerely yours,

HILDEGARD THOMPSON,
Acting Assistant Commissioner.

(9806-1)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Nos. 2 and 3

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, *Appellant,*

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees.*

ORGANIZED VILLAGE OF KAKE, and ANGOON COMMUNITY ASSOCIATION, *Appellants,*

v.

WILLIAM A. EGAN, Governor of Alaska, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR APPELLEES

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Nos. 2 and 3

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, *Appellant,*

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees.*

ORGANIZED VILLAGE OF KAKE, and ANGOON COMMUNITY ASSOCIATION, *Appellants,*

v.

WILLIAM A. EGAN, Governor of Alaska, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the Supreme Court of Alaska is reported at 362 P. 2d 901 (1961). A copy of the opinion is contained in the separate Appendix filed with the Statement as to Jurisdiction, Nos. 2 and 3, O.T.

1961, by appellants herein. (Citations to the opinion ("Op.") refer to pages in the Appendix.)

The opinion of the District Court for the District of Alaska, from which appeal was initially taken to this Court, is reported at 174 F. Supp. 500 (R. 59-66).

The opinion earlier entered by this Court is reported at 363 U.S. 555 (1960). The opinion of Mr. Justice Brennan, granting appellants a stay of execution pending the outcome of their appeals, is reported at 4 L. Ed. 2d 34, 80 S. Ct. 30 (1959).

JURISDICTION

Probable jurisdiction was noted by this Court on October 23, 1961. Jurisdiction rests on 28 U.S.C., Sec. 1257(1), (2).

QUESTIONS PRESENTED

1. Does Ch. 17, SLA 1959 as amended, forbidding the use of fish traps, apply to appellants Kake and Angoon?

A. Does Sec. 4 of the Alaska Statehood Act, by which the State disclaimed control over native "property (including fishing rights)" deprive the State of authority to regulate appellants' method of fishing?

B. In the absence of express disclaimer of state jurisdiction in the Statehood Act, do state fisheries regulations apply to Kake and Angoon as well as to other Alaskan areas?

2. Does Ch. 17, SLA 1959 as amended, forbidding the use of fish traps, apply to appellant Metlakatla?

A. Do the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. Sec. 358, the Presidential Proclamation No.

1332, 39 Stat. 1777, as ratified by the Act of May 7, 1944, 48 Stat. 667, and Sec. 4 of the Alaska Statehood Act, all of which set aside and preserved a temporary area for the exclusive fishing use of the Metlakatlans, deprive the State of control over the methods of fishing within that area?

B. In the absence of express deprivation of state jurisdiction through this series of official acts, do state fisheries regulations apply to Metlakatla as well as to other Alaskan areas?

STATUTES INVOLVED

The statutes, Presidential Proclamation, regulations, involved are lengthy, and are set forth in Appendix A of this brief. Included therein are the pertinent portions of:

1. Alaska Statehood Act, Sec. 1, 72 Stat. 339.

2. Alaska Statehood Act, Sec. 4, 72 Stat. 339.

3. Alaska Statehood Act, Sec. 6(e), 72 Stat. 340-341.

4. Alaska Omnibus Act, Sec. 2, 73 Stat. 141.

5. White Act, Sec. 1, 43 Stat. 464, amended 44 Stat. 752, 48 U.S.C., sec. 221 et seq.

6. Treaty of Cession, Art. VI, 15 Stat. 539.

7. Presidential Proclamation No. 1332, April 28, 1916, 39 Stat. 1777.

8. Act of May 7, 1934, Sec. 3(c), 48 Stat. 667.

9. Session Laws of Alaska 1959, Ch. 17, Sec. 1, as amended by Session Laws of Alaska 1959, Ch. 95.

10. Session Laws of Alaska 1959, Ch. 95, Sec. 1.

11. C.F.R., Tit. 25, Ch. 1(H), Part 88.2 (Supp. 1961).

STATEMENT OF THE CASE

Since time immemorial, Alaska has been blessed with a natural food resource in the form of annual migrations of salmon. Responding to instinct, the fish seasonably form in huge schools in the salt water, enroute to the mouths of the fresh water rivers and streams they will soon enter. At a time dictated primarily by instinct, the schools commence a mass movement from the sea toward the mouths of the rivers and streams. It is at this time of migration that the commercial fishing for salmon occurs. The annual harvest may well be said to be the bulwark of the entire Alaskan economy. ROGERS, ALASKA IN TRANSITION, p. 94 (1960).

During Alaska's territorial status, exclusive regulatory control over the commercial fisheries was exercised by the Federal Government. Regulations specifying legal means of fishing as well as permissible areas of fishery were promulgated by appropriate federal agencies acting under congressional authorization. Under the statutory framework of regulation, all fishermen in Alaska were treated as equals. While Alaska's commercial fishing population was composed of nearly one-half native fishermen,[1] they were never subject to different regulations or distinguished in any way from their fellow citizens.

During the years of federal regulation, the fish trap came into existence and use. A trap consists, first of all, of a wire or webbed fence, stretched from the shore

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[1] The 1950 census indicates that a total of 3,121 Alaskans are employed in the fishing industry. Of that total, 1,317 are nonwhites. U.S. Bureau of the Census, United States Census of Population: 1950, Vol. II, Part 51.

to the seaward and from the ocean bottom upward to a point above the high water mark. Located at the seaward end of the fence is an opening into the heart or pot. The trap operates in conjunction with the recognized fact that salmon parallel the shoreline in traveling toward their spawning streams on an incoming tide. Fish traveling in such a manner are temporarily halted by the webbing stretched from the trap to the shoreline. As a result, the fish turn seaward in an attempt to avoid the obstruction, eventually being diverted into the heart or pot, where they remain until removed.

The effect of traps upon the fishery can be devastating,[2] and it is not surprising that public opposition to them appeared quickly in Alaska when the steady depletion of the resource became evident. Denied the power to regulate the fisheries, Alaskans took the only course open to them. From 1913 to statehood, Alaskans pleaded with federal authorities to regulate or abolish traps.[3] Opposition was not restricted to white fishermen. Native fishermen, who comprised nearly half of the total fishing population, suffered equally from the

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[2] The tremendous effect that even one trap can have upon the fishery was noted by this Court in *Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78 (1918).

[3] Opposition took the form of memorials to Congress from the Territorial Legislature, e.g. SLA 1931, 275; SLA 1947, 325-6; SLA 1953, 401-2; SLA 1955, 447-8.

depletion of salmon and strove equally hard for the abolition of this particular means of fishing.[4]

In 1956, the Alaskan people adopted a constitution in hope of imminent statehood. In conjunction with that constitution, the people similarly adopted Ordinance #3, which was to become effective on the same date as the constitution. That ordinance read:

> "As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of

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[4] It is significant that as recently as November, 1959, when the only traps operating in Alaska were native traps, the Alaska Native Brotherhood reiterated its stand for complete abolition of traps. The resolution adopted by that group is as follows:

"Convention at Yakutat, November 9-14, 1959.

RESOLUTION No. 64-36, INTRODUCED BY KLAWOCK, CAMP #9

ENTITLED: Abolition of all Fish Traps

Whereas, the native people of Alaska, through their officially recognized organization, have consistently opposed the use of fish traps in Alaskan waters, and

Whereas, their opposition to these fish traps is in no way contrary to the State Constitution of Alaska,

THEREFORE BE IT RESOLVED that this convention of the Alaska Native Brotherhood and the Alaska Native Sisterhood reiterate our stand for complete abolition of traps, and that a copy of this resolution be directed to the Governor of Alaska.

/s/ A.E. WIDMARK
Grand President, A.N.B.

Attest

/s/ C.E. PECK
Grand Secretary, A.N.B."

The prominence of the ANB as native spokesman is discussed in COHEN, FEDERAL INDIAN LAW, p. 963 (revised by Dept. of Interior 1958); also see GRUENING, STATE OF ALASKA, 397-8 (1959).

> salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State."

Ordinance No. 3 was adopted by a vote of 21,285 to 4,004 (Op. 9).

On January 7, 1958, in response to Alaskan desires, Congress passed the Statehood Act, providing for the subsequent admission of Alaska to the Union. 72 Stat. 339 (1958), amended by 73 Stat. 141 (1959). Section 6(e) of that Act provided for the termination of federal control over the regulation of Alaskan fish and wildlife. Federal authority was to terminate upon the state's establishing certain required regulatory machinery of its own. No provision was made in Sec. 6 for any continuation of federal management.

However, Section 4 of the Statehood Act did exempt from state control certain native fishing rights in conjunction with a general reservation to the Federal Government of control over ". . . property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts . . . or is held by the United States in trust for said natives; . . ." It is over the scope of the disclaimer in Sec. 4 that this legal controversy has arisen.

On January 3 of 1959, Alaska was admitted to the Union. Shortly thereafter, the Alaska Legislature adopted legislation to implement Ordinance #3, banning the use of fish traps for use in commercial fishing. Chapter 17, SLA 1959, as amended by Ch. 95, SLA 1959. No exception was made in the statutory prohibi-

tion for natives or native communities which, until statehood, were always subject to general fisheries regulation.

Following the enactment of Ch. 17, SLA 1959, the Secretary of the Interior issued regulations banning the use of fish traps in the State. The Secretary's action was predicated on the theory that the State had not yet established its system of fish and game management and therefore, under Sec. 6(e) of the Statehood Act, he was required to manage Alaska's fisheries. In addition, the Secretary felt that his position was that of trustee-administrator for state laws, thereby requiring him to adopt regulations similar to state desires. The Secretary's action and views were upheld. *Ketchikan Packing Co.* v. *Seaton,* 267 F. 2d 660 (D.C. Cir. 1959).

However, in issuing the regulatory ban, the Secretary refused to adopt the complete prohibition prescribed by state statute. Under the theory that Sec. 4 of the Statehood Act placed all native fishing of any nature exclusively under federal control and made state laws inapplicable to native fishermen, he exempted certain fish traps owned by natives from the general prohibition (S.R. 85, 104-5, 131-2). In particular, traps at Kake, Angoon and Metlakatla, three Alaskan villages, were authorized. 24 Fed. Reg. 2053.[5]

On April 17, 1959, the State adopted a comprehensive fish and game regulatory code in compliance with the Statehood Act, and subsequently assumed full manage-

[5] In 1960 the Secretary again adopted regulations authorizing appellants' traps with one modification. While the original regulations only granted permission to operate traps for the 1959 fishing season, the present regulations grant the privilege for an indefinite duration. C.F.R., Tit. 25, Ch. 1(H), Part 88.2 (Supp. 1961).

ment authority over the fisheries resource. On June 17, 1959, after prior warning to the Secretary that the State would enforce its laws equally on all citizens, state officers arrested several persons and seized one trap on which pre-season work was being performed.

Actions for restraining orders were immediately commenced by appellants in the District Court for the District of Alaska. On motion by the appellees, all complaints were dismissed (R. 59-66), 174 F. Supp. 500 (1959). Appeal was taken directly to this Court, due to the fact that the present Alaska Supreme Court had not yet been organized. (R. 79.) Pending the final outcome of the appeals, a stay was issued by Mr. Justice Brennan on July 11, 1960. 4 L. Ed. 2d 34 (1960).

On June 20, 1960, this Court noted jurisdiction but reserved decision on the merits. 363 U.S. 555 (1960). The cases were remanded to the newly created Supreme Court of Alaska with directions to determine first whether the state legislation in issue was meant to apply to the appellants, and second, whether the exercise of the state police power was justified.

The Supreme Court of Alaska, after full argument, unanimously affirmed the District Court's decision. After first construing Ch. 17, SLA 1959 as amended as fully applicable to appellants as well as other state citizens, the court upheld the statute's validity by ruling that Sec. 4 of the Statehood Act did not deprive the State of regulatory control over native fishing. As fish traps possessed no special status their abolition was held to be within the scope of state power. Appeal has again been made to this Court.

The appellants in this controversy are three ~~primarily~~ native communities in Southeastern Alaska.

None of them claim any aboriginal or historical use of fish traps. The Metlakatlans immigrated from Canada in 1887, and have used fish traps since 1914. *Alaska Pacific Fisheries* v. *U. S.*, 248 U.S. 78 (1918). Kake and Angoon commenced using fish traps in 1950 and 1948 respectively (R. 83, 102). The fish traps used by appellants have been used only at such times as the same have been authorized by the Secretary of the Interior under general fishing regulations applicable to the whole of Alaska, promulgated pursuant to the authority of the White Act and similar fisheries legislation, "for the purpose of protecting and conserving the fisheries." Sec. 1, 43 Stat. 464, 48 U.S.C., Secs. 221-224. Pursuant to Sec. 1 of the White Act, all Alaskans—Indians, whites, and half bloods—partaking in the commercial fishery have received common treatment and no special privilege to use traps have ever been granted to appellants as communities or to their inhabitants as individuals.

The one difference between appellants Kake and Angoon and appellant Metlakatla lies in the fact that in 1916 the Government set aside for the Metlakatlans a water area within which they alone could fish. In all other respects the communities are similar.

SUMMARY OF ARGUMENT

The rights and duties of appellants in this case are essentially dependent on a question of statutory interpretation. If Alaska was admitted to the Union under an enactment which retained control of the fishing activities of appellants to the Federal Government, their conduct is free from state interference. If, on the other hand, no such exception was made, the State has full regulatory control over them as it does over the rest of its citizens.

The only exception to state authority over native fishing is provided in Sec. 4 of the Statehood Act. That section provides that Alaska forever disclaims all right and title to "property (including fishing rights)" held by natives, or held by the Government in trust for them. The extent of the disclaimer is limited by two requirements. First, the claim must be in the nature of a native "right," or at least a type of claim which may be parenthetically included within the term "property." Second, and equally important, the "right" must have been "held" at the date of passage of the Statehood Act. All parties agree that Congress, in adopting Sec. 4, merely meant to maintain the status quo, and not to *create* new rights.

Prior to statehood, all fishing in Alaska was conducted under regulations adopted by the Department of the Interior. Under those regulations, areas where fishing could be undertaken, the times when fishing was permissible, and the types of equipment that could be used in particular areas were specified. The use of fish traps or any other kind of equipment under this comprehensive regulatory scheme created no "rights" of any kind in the operator. The Government was free to terminate the use of traps by a change in the regulations. Similarly, the use of a site for trap fishing gave no "rights" against subsequent appropriation of that site by another trap operator. Without any previously established right to use a trap, appellants cannot claim that their trap operation is exempted from state control by Sec. 4.

Appellees do not mean to infer that there are no native fishing rights in Alaska. There are such rights, established by Congress, and their nature will be subsequently discussed. None of them are in issue here.

Past federal regulations governing the use of fish traps possessed no special status in the over-all regulatory program. Therefore, appellants' contention that their use of fish traps was a "right" as defined in Sec. 4 implies of necessity an interpretation of Sec. 4 that deprives the State of *all* regulatory control over native fishing. This interpretation is completely inconsistent with past congressional policy, which has been both to treat all fishermen in common, and to hasten the complete integration of the native peoples into the general society. The interpretation is similarly inconsistent with the rest of the Statehood Act, which provides for the complete termination of federal control over the Alaskan fishery and transfer of all properties previously necessary for management to the State. Finally, the very impact of such an interpretation indicates its fallacy. Natives comprise nearly one-half of Alaska's fishing population. If one sovereign is to completely regulate half of the fishermen, while another regulates the other half, it may well follow that neither sovereign can perform an adequate regulatory function. The efforts of one may be cancelled out by the efforts of the other, to the detriment of the entire population, native and non-native.

Therefore, the disclaimer in Sec. 4 cannot by any standards be interpreted to mean that control of all native fishing is in the hands of federal authorities. Section 4 only has application to certain congressionally created native fishing rights, none of which are in issue here.

Nor does the fact that Metlakatla was established within the confines of an exclusive fisheries reserve forbid the State from imposing reasonable conservation measures in regulating the fisheries within that

reservation. Regulation of this nature is not inconsistent with the purpose for which the reserve was created. Prior to statehood, the Metlakatlans were granted an exclusive fisheries reservation, but they were not given any rights to take fish by means forbidden to other Alaskan citizens. Congressional policy has never sought to free Metlakatlans from general fisheries regulation, but only to forbid trespassers in the water area. The Metlakatlans may have possessed a right to fish exclusively in an area, but that right alone was preserved under the Statehood Act.

Since regulatory control over native fishermen and fisheries was not reserved in the Statehood Act, it passed to the State as a natural concomitant of its admission to the Union on an equal footing with other states. The State, therefore, has full authority to regulate appellants' fishing activity, and in particular to forbid their use of traps.

ARGUMENT

I. KAKE AND ANGOON ARE SUBJECT TO STATE LAW FORBIDDING FISH TRAPS

A. SECTION 4 OF THE ALASKA STATEHOOD ACT DOES NOT BAR APPLICATION OF STATE LAW PROHIBITING THE OPERATION OF FISH TRAPS TO KAKE AND ANGOON

Introduction

The express disclaimer which is the crux of this litigation is found in Sec. 4 of the Alaska Statehood Act. That section provides in part:

> "As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to . . . any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said na-

tives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority . . ." 72 Stat. 339 (1958), amended by 73 Stat. 141 (1959).

Appellants contend that the disclaimer over property (including fishing rights) in Sec. 4 deprives the State of Alaska of authority to restrict the operation of their fish traps. In actuality, the nature of appellants' claim goes far beyond the validity of this particular state restriction. While this controversy centers about state regulation of a particular means of commercial fishing, there is nothing unique about the means involved. The regulation or abolition of fish traps is but one phase of an over-all fisheries management program which regulates all means of fishing, in addition to setting the times and areas where fishing is permissible. If appellants are free to use traps, they are similarly free to use any form of fishing equipment, to fish at any place, and at any time, entirely free of state control. Indeed, Kake and Angoon frankly admit that their urged interpretation of Sec. 4 would deprive the state of regulatory control over all native fishing of any kind (KABR 11). The United States apparently supports this broad interpretation (USBR 12).

Appellants' interpretation of necessity equates the disclaimer over native fishing *rights* with a hypothetical disclaimer over native *fishing* in general. The interpretive equation is both unwarranted and erroneous. First, it distorts the clear language and accepted mean-

ing of the words in Sec. 4; second, it disregards nearly 100 years of congressional policy toward Alaskan natives; third, it is inconsistent with the rest of the Statehood Act; and fourth, such an interpretation would have an effect so absurd as to demonstrate its invalidity.

(1) Kake and Angoon had no "fishing rights" as were disclaimed by the State of Alaska in Sec. 4 of the Statehood Act

In ascertaining the scope of the disclaimer of state jurisdiction prescribed by Sec. 4, several points are immediately obvious. First, the State only disclaimed as to rights "held" by or for natives at the date of the Act. No new rights were to be created.[6] Second, only fishing "*rights*" were disclaimed by the State. Section 4, by its terms at least, does not provide a state disclaimer over all native "fishing." Finally, the over-all disclaimer is over native "property." Fishing rights are only parenthetically included.

Native property rights, including fishing rights, have a well defined judicial meaning. Unless subsequently it appears that Congress intended to deviate from those established definitions, the scope of the disclaimer should be measured by them.

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[6] That Congress sought to maintain the *status quo* is evidenced not only by committee reports on the actual Statehood Act, but by reports on similar language contained in previous statehood acts which failed of passage. E.g. H.R. Rep. No. 88, 84th Cong., 1st Sess., 47; H.R. Rep. No. 624, 85th Cong., 1st Sess. 19; S. Rep. No. 1929, 81st Cong., 2d Sess. 1, 2, 11 (1950); H.R. 331, 81st Cong., 2d Sess. (1949); H.R. Rep. No. 255, 81st Cong., 1st Sess. 13 (1949). Indeed, the appellants agree that Congress fully intended to maintain the status quo (MEBR 30) (USBR 20-21). The controversy has arisen in determining what Congress thought the status quo to be at the time of statehood.

Indian rights in property may be categorized in two groups. First, there is "recognized" Indian right or title. The recognition spoken of in this context is that of the Federal Government, which through treaty or act of Congress creates certain rights in Indians. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 277-8 (1951). A recognized right is not only protected against interference by third parties, but upon a subsequent taking by the Government gives rise to a compensable claim. *United States* v. *Creek Nation,* 295 U.S. 103 (1935).

The second classification of Indian rights is "unrecognized" right or title. This classification may in turn be subdivided. First, Indians may possess aboriginal rights, gained from continuous and exclusive exercise of the right from time immemorial, *United States* v. *Santa Fe Pacific R. Co.,* 314 U.S. 339 (1941). Second, the Government may create for Indians certain temporary rights subject to subsequent modification or abolition. *Aleut Community of St. Paul Island* v. *United States* (Ct. Cl. 1954), 177 F. Supp. 427; *Ute Indians* v. *United States,* 330 U.S. 169 (1947).

The basic distinction between recognized and unrecognized rights lies exclusively in the parties against whom the right is enforceable. Recognized title is enforceable against the Government and third parties. Unrecognized title is only valid against third parties.

If Kake and Angoon are to succeed in their contention that they possessed "rights" at the date of the Statehood Act which were disclaimed by the State of Alaska, it is incumbent upon them to specify the nature of those rights. Appellees will concede that so far as they are concerned, as third parties it is insignificant

whether the right was recognized or unrecognized. However, it must be one or the other if it is to be classified as a right at all.

Appellants have made no claims that they possess any recognized rights of property or fishing in Alaska (KABR 24). The absence of treaty or congressional act establishing such rights precludes their existence. Any rights claimed by appellants, then, must take the form of unrecognized rights. Appellants must show that they have gained and preserved an aboriginal claim, or that the Government has acted to create rights in them protected against third parties.

The present existence of any aboriginal rights in Alaskan natives was expressly repudiated in *Miller* v. *United States,* 159 F. 2d 997, 1001-2 (9th Cir. 1947); overruled on other grounds, *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1951). The Court relied on Article VI of the Treaty of Cession, 15 Stat. 539, by which all dominion over Alaska was passed from Russia to the United States "free and unencumbered by any . . . possessions . . . except merely private individual property holders; . . ." Since aboriginal title is clearly tribal and not private in nature (*Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 307 (1902)), the Court concluded:

> "It seems quite clear, therefore, that whatever 'possession' the Tlingit Indians had 'from time immemorial prior to' the year 1867 was a tribal and not an individual right, and did not come within the classification of the excepted 'private individual property' specified in the Russian treaty. Consequently, the Tlingits' 'original Indian title' to the tidelands in question was extinguished by that state paper." Id. at 1002.

Even assuming contrary to the *Miller* case that aboriginal fishing rights did survive the Treaty of Cession, it is clear that these rights were subsequently destroyed. With the exceptions of the Metlakatla and Karluk fishery reserves, Congress has declared all waters in Alaska open to a public fishery. Since 1924, the fishery was managed under the White Act, which specifically forbade the granting or protection of exclusive or several rights in Alaskan waters. Section 1, 43 Stat. 464, 48 U.S.C., Secs. 221-224. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949). It is difficult to see how Congress could have repudiated the continued existence of aboriginal fishing rights in a more definite manner. Aboriginal rights, by their very nature, are exclusive rights. *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 326 (1941). By an express negation of exclusive rights, therefore, Congress terminated their existence. It is indisputable that Congress was fully empowered to abrogate any such aboriginal rights. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1951).

The ethical considerations inherent in such a taking need not be considered here. Suffice to say that the natives are not without recourse. Under a special jurisdictional act, the Court of Claims has recently granted these very natives a right of compensation for the taking of their aboriginal rights.[7] *Tlingit and Haida Indians* v. *United States*, 177 F. Supp. 452 (1959). The court specifically noted that:

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[7] Appellants claim that the *Tlingit and Haida* case held that aboriginal fishing rights "exist" (KABR 29, n. 25). This claim confuses the present with the past. The Court held that while aboriginal rights had *existed*, they had been extinguished by subsequent government action. Indeed, this was the very grounds on which a compensable right was granted.

"The most valuable asset *lost* to these Indians was their fishing rights in the area they once used and occupied to the exclusion of all others . . ." (Emphasis supplied.) Id. at 468.

The area considered in the Court of Claims proceedings encompasses the area in which these fish traps are now operating. It would indeed be anomalous if the same natives who have been granted a right to compensation for a taking of their historical rights would be permitted to predicate their present claim on the continued existence of those rights.

It is equally impossible to find any congressional or executive action which established unrecognized rights in these natives. Kake and Angoon have always fished under the commercial fisheries regulations applicable to all of Alaska. They have never been distinguished from other Alaskan fishermen. The traps they have used have been authorized under regulations which permitted any person to use traps within the particular area.[8] Therefore, if appellants received any

[8] For example, in 1958 the traps used by Kake and Angoon were operated under the following regulation of the Department of the Interior (C.F.R., Tit. 50, Ch. 1, (f) (1958)):

"Sec. 115.27. *Areas open to traps.* The use of any traps for the capture of salmon is prohibited, except as follows:—

• • • • • • •

"(b) *Western District.*

• • • • • • •

"(4) Chichagof Island: East coast . . . (iii) from 57°36'37" N. lat. to 57°35'52" N. lat., . . .

• • • • • • •

"(11) Admiralty Island: West coast from 57°22'07" N. lat. to Distant Point.

• • • • • • •

"(13) Admiralty Island: West coast . . . (iii) within 1,000

unrecognized rights, those rights of necessity must have been created from the mere fact that appellants were permitted to fish on the same basis with other fishermen.

The creation of a protected right from completely equal treatment is at best difficult to comprehend. But it is not necessary to deal in abstractions. Federal courts in Alaska have previously had opportunity to consider whether the mere act of fishing, and contextually, the operation of fish traps under general fisheries regulation created any sort of rights in the operator.[9]

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feet of 57°13′57″ N. lat.

• • • • • • •

"(c) *Eastern district* . . .

• • • • • • •

"(4) From the south side of Fanshaw Bay at 133°32′27″ W. long. to Cape Fanshaw thence southeasterly to 133°29′57″ W. long.

"(5) Admiralty Island: Southeast coast (i) from Point Pybus to 57°18′57″ N. lat.; and (ii) from 57°20′07″ N. lat., 133°54′58″ W. long. to False Point Pybus.

• • • • • • •

"(9) (i) From a point ½ statute mile southeast of Point Macartney to Point Macartney; (ii) within 2,500 feet of 57°03′23″ N. lat., 134°01′51″ N. lat., 133°56′13″ W. long.

"(10) Within ¼ statute mile of Cornwallis Point.

The traps operated by Kake and Angoon were within the above designated areas. Any person, community, or association was equally free to operate traps therein.

[9] The relevance of local law on the question of whether "rights" exist is indicated by the decision of this Court in *Damon* v. *Territory of Hawaii*, 194 U.S. 154 (1904); *Boquillas Land and Cattle Co.* v. *J. N. Curtis*, 213 U.S. 346 (1909). These decisions are applicable when the Act which speaks of "rights" is adopted by the same sovereign who previously determined the existence of "rights." Here, the Federal Government occupies both positions.

The answer has been unequivocally negative. No individual or community had a "right" to operate a fish trap—even one enforceable against third parties. *Thlinget Packing Co.* v. *Harris and Co.*, 5 Alaska 477 (D. Alas., 1st Div., 1916); *Columbia Salmon Co.* v. *Berg*, 5 Alaska 538 at 546 (D. Alas., 3d Div., 1916); *Fischer* v. *Everett*, 11 Alaska 1, 66 F. Supp. 540 at 542 (D. Alas., 3d Div., 1945); *Canoe Pass Packing Co.* v. *United States* (9th Cir., 1921), 270 F. 533. Neither previous use nor large investment was sufficient to create such a right. *General Fish* v. *Markley*, 13 Alaska 700, 105 F. Supp. 968 (D. Alas., 3d Div., 1952). Fish traps were treated in law as entirely similar to all other fishing equipment. The individual who first started operating the device had a priority purely because of his physical location, much as only one net can fish in a specified area of water at one time.

In conjunction with the fact that native rights *were not* created by participation in the fishery under general regulatory authority, this Court has previously held that such rights *could not* have been created. In *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1948), the Court struck down an attempt by the Secretary of the Interior to utilize his general regulatory authority over Alaska's fisheries in creating an exclusive native fishery. The Court held that the intent of Congress, as clearly expressed in the White Act, was to forbid creation of exclusive rights or privileges in any group, regardless of whether they were natives or not. Id. at 120-123.

Therefore, prior to statehood, appellants Kake and Angoon had neither recognized nor unrecognized fishing rights. Their use of traps could be freely abolished by the Government. It could similarly be validly in-

fringed upon by third parties, competing on an entirely equal basis in the general fishery. They possessed no "fishing rights" whatsoever, and in particular, no rights to operate fish traps or any other form of fishing gear.

A reference to certain legitimate native fishing rights created under federal control, may tend, by comparison, to clarify the prior discussion. While Alaskans in general have been forbidden to take fur seals, certain natives have been permitted to take them for subsistence. Act of February 26, 1944, 58 Stat. 100, 16 U.S.C., Sec. 631(c); and see *Aleut Community of St. Paul Island* v. *United States* (Ct. Cl. 1954), 177 F. Supp. 427. This is not a *recognized* right in that it may be terminated by the Government at any time, but it clearly is a right in that it can be validly protected against third parties. The seal fishery[10] is not the only place where native rights have been created. By executive order, the natives of Karluk have been provided with an exclusive fisheries reserve. Public Land Order 128, issued pursuant to Executive Order 9146, April 24, (1942), 1 C.F.R., Cum. Supp. 1149. While the withdrawal by executive order probably did not create a compensable interest in the natives upon subsequent abolition of the reserve, it did create a right of occupancy protected against third parties. While Metlakatla's rights will subsequently be discussed in detail, it is significant for the present to note that an exclusive fishing area was temporarily reserved to them—first by executive order, and subsequently by Congress itself. Presidential Proc. #1332, 39 Stat. 1777; Act of May 7, 1934, 48 Stat. 677. The withdrawal, by its specific

[10] Seal "fishery" is the accepted terminology. COHEN, FEDERAL INDIAN LAW, 944-945 (revised ed. 1958).

temporary terms, probably did not create a recognized right, but unquestionably did create a right of exclusive use as against other fishermen. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918). In addition to these federally created rights, it is possible that certain natives in the Interior of Alaska, who have taken salmon for *subsistence* since time immemorial, still retain their aboriginal rights to do so.[11]

These rights are noted purely for the purpose of indicating that Congress, in using the phrase "fishing rights," was not speaking loosely. There are such rights in Alaska, and these rights are protected from state interference. But it is *only* those rights which are protected.

There is additional evidence of the fact that in speaking of native fishing rights Congress specifically had in mind recognized and unrecognized rights, rather than some new concept of "right." Section 4, after first reserving control over native "fishing rights" to the Federal Government, states:

> "... *Provided,* That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to

[11] The natives on the Yukon and Kuskokwim Rivers have historically gained their sustenance by fishing, using small hand traps and fish wheels. Chapter 17, SLA 1959, as amended, specifically excludes small hand driven traps from the general fish trap ban.

any such claim shall be unaffected by anything in this Act: . . ."

This provision is clearly couched in the terminology of recognized and unrecognized rights. Congress did not wish, by reserving control over unrecognized rights as well as recognized ones, to imply that those unrecognized rights thereby became recognized. But most important, the provision indicates that Congress was specifically aware of the legal nature of the rights they were dealing with. When the terminology "fishing rights" was used, it was with full knowledge of the fact that those words had well defined meanings. Indeed, the Government in its argument makes specific note of the fact that the nature of Indian "rights," recognized and unrecognized, was fully explained to Congress in hearings on the Statehood Act. (USBR 18, 19.)

Congress, then, in Sec. 4 preserved all fishing rights of natives. But in doing so, they did not enlarge traditional legal concepts of native rights. Parties for whom rights were never created or protected cannot claim an exemption from state regulation under a section that was obviously intended only to apply to specific rights. Since Kake and Angoon cannot claim fishing rights of any nature—recognized or unrecognized—their fishing activities are not exempt from state regulation under Sec. 4.

(2) Appellants' interpretation of Sec. 4 is inconsistent with past congressional policy toward Alaskan Indians

Congressional action touching on Indian affairs should clearly be interpreted within the framework of past congressional policy toward that Indian group. *United States* v. *Chavez*, 290 U.S. 375 (1933). Radical

departures from that standard are not favored. It is therefore highly relevant to examine congressional policy toward Alaskan natives prior to statehood. For if congressional policy has clearly been to treat natives or an entirely equal basis with whites, it would be a distorted inference to claim that a continuation of that policy in actuality meant the formation of an entirely new approach of separation and special treatment. Cf. *Oklahoma Tax Commission* v. *United States,* 319 U.S. 598, 603-4 (1943).

The early history of federal policy toward Alaskan natives differed enormously from the policy toward Indians in the lower states. With vast areas of land and few occupants, there was no danger of hostilities which accompanied the expansion westward. No treaties were ever entered into with Indian groups, though the treaty power was still available at the time of Alaska's purchase.[12] No reservations were set aside for their exclusive use. Initially, at least, the natives were left to make their own amalgamation into the white society as best they could without federal aid.

Integration came quickly. As early as 1886 one federal court, in commenting on the status of the Indian groups, noted:

> "What, then, is the legal *status* of Alaska Indians? Many of them have connected themselves with the mission churches, manifest a great interest in the education of their youth, and have adopted civilized habits of life. Their condition has been gradually changing until the attributes of their original sovereignty have been lost . . ."

[12] Alaska was purchased on June 20, 1867. The power to enter into treaties with Indian tribes was effectively terminated by the Act of March 3, 1871, 16 Stat. 544, 546.

In re Sah Quah, 31 Fed. 327 (D. Alaska 1886) at 328.

The same judge recognized another fact which is unique to Alaskan natives. Unlike their counterparts in other states, the natives' social organization was not tribal. There was no such organization as would permit them to exercise independence from, or supremacy to, generally applicable laws. Id. at 329.

These two factors are dominant in Alaska native history. First, the tribal status, if indeed it ever existed, exists no more.[13] Second, amalgamation into the civilized community proceeded at an amazing pace, considering the fact that initially no federal aid was

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[13] That Congress was fully aware of the absence of tribal type affiliation in many areas of Alaska is borne out by the terms of the Wheeler-Howard Act, which, when it was extended to Alaska, provided:

> "Sec. 473(a). Same; application to Alaska
>
> Sections 461, 465, 467, 468, 475, 477, and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska; *Provided,* That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well defined neighborhood, community, or rural district may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title." Act of May 1, 1936, Ch. 254, Sec. 1, 49 Stat. 1250, 25 U.S.C. Sec. 473(a).

Compare this phraseology with Sec. 476, 25 U.S.C. applying to other American Indians:

> "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws. . . ."

Also see *Tlingit and Haida Indians* v. *United States,* 177 F. Supp. 452 at 463 (1959).

granted to ease the transition from one civilization to another.

The first real federal interest in Alaska's native population was indicated in 1905, when an ethnologist was delegated to investigate the status of Alaskan natives. The subsequent report divided natives into two groups for the purpose of future federal policy toward them. The first classification is of interest here. It was composed of native peoples who were, to a large extent, self-sustaining, had nearly completely amalgamated into the white society, and needed only supplementary federal programs to aid them further. That self-sustaining group was composed of the Tlingits, the Haidas, and the Tsimshians, all of whom are appellants here. *Condition and Needs of the Natives of Alaska,* 58 Cong., 3d Sess., Sen. Doc. 106.

In recognition of this continuing process of amalgamation, Congress sought to aid rather than detract from it. With two extremely limited exceptions no native reservations were ever established in Alaska. Whatever their value in other states, reservations in Alaska were condemned as racial segregation and discrimination in its worst form. *United States* v. *Libby, McNeill & Libby,* 14 Alaska 37, 107 F. Supp. 697 (D. Alas. 1952). Congress did not exclude Indians from territorial taxation. Crimes committed by Indians in Alaska have always been punished by territorial and state courts, and criminal law is applicable to all Indians wherever situated and regardless of the nature of the offense.[14] *United States* v. *Booth,* 17 Alaska

[14] *Petition of McCord,* 17 Alaska 162, 151 F. Supp. 132 (D. Alas., 1957) represents an exception to this general statement. The case is unique in this area of Alaska law, and is distinguished in *United States* v. *Booth,* 17 Alaska 561, 161 F. Supp. 269 (D. Alas., 1958).

561, 161 F. Supp. 269 (D. Alas., 1958). The Territory, and now the State, have traditionally afforded equal educational opportunities to white and native alike. Indeed, the educational facilities for the three appellants in this action are state facilities. Federal authorities have not only sanctioned this practice, but advocated the complete transfer of all federal educational facilities to state control.[15] The vote was granted to Alaska with no differentiation as to whites and natives. Act of August 24, 1912, Ch. 887, Sec. 5, 37 Stat. 513, referring to Act of May 7, 1906, Ch. 2083, Sec. 3, 34 Stat. 170. The natives have not only exercised their voting privileges but have held many high elective offices. Of the 60 members of the First State Legislature, nine were natives. The president of the Senate, William Beltz, was an Eskimo. Senator Frank Peratrovich, of Tlingit ancestry, succeeded Senator Beltz. Senator Peratrovich, incidentally, was elected from an election district composed 78.3% of whites. ROGERS, ALASKA IN TRANSITION, 55 (1960).

But the clearest indication of congressional policy was found in federal management of the commercial fisheries. In Alaska's greatest industry Congress refused to segregate or distinguish fishermen on the basis of race. The White Act, under which Alaska's commercial fisheries were managed, specifically directed that regulation was to be generally applicable, and could not be utilized for the benefit of one racial group or another. *Hynes* v. *Grimes Packing Co.*, 337 U.S.

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[15] In 1951, the Area Director of the Alaska Native Service officially stated: "Plans are being completed whereby all ANS schools will be transferred to Territorial responsibility in an orderly manner and on a yearly basis by 1960." *Annual Report of the Governor of Alaska*, 80 (Fiscal Year 1952).

86 at 120-123. Where natives were dependent upon fisheries for *sustenance,* Congress made exceptions. But in the vast areas of Alaska, where commercial rather than subsistence fishing occurred, all were treated equally.

The over-all policy of Congress was eminently successful. In the words of one federal judge:

> "... [T]he Indians of Southeastern Alaska, and particularly the Haidas, have not only abandoned their primitive ways and adopted the ways of civilized life, but are now fully capable of competing with the whites in every field of endeavor. It is a matter of common knowledge that today the Indians of Southeastern Alaska prefer the white man's life despite all its evils and shortcomings . . ." *United States* v. *Libby, McNeill & Libby,* 14 Alaska 37, 107 F. Supp. 697 at 699 (D. Alas., 1952).

Appellants now take the position that in passing the Statehood Act, Congress sought to ignore nearly 100 years of consistent policy toward establishing common treatment of both races. It seems illogical to claim that after consistently treating all Alaskans equally in regard to fishing as well as other phases of life, Congress suddenly desired to reverse itself—to segregate Alaskans on the basis of race—to grant to Alaska control over white fishermen, but not over native.

The claim is particularly illogical in light of the fact that in spite of a general equality of treatment, Congress did previously establish certain specific native rights of fishery, the nature of which have been previously discussed. In such cases a continuation of congressional policy would imply a continual protection. But these are specific rights—not general con-

trol. A limited interpretation of Sec. 4 has the merit of only continuing those distinctions that Congress previously sanctioned, and of not creating new artificial distinctions, based purely on race, that Congress never previously sanctioned, and indeed, specifically avoided.

(3) Appellants' interpretation would create an inconsistency within the Statehood Act itself

Section 6(e) of the Statehood Act is a clear indication of the congressional desire to dispose of the management of the entire fishery to the new state.[16] That section primarily provides for the termination of federal authority over the management of the fish and game resources of the State upon the State's establishing its own system. No exception is made for federal retention of authority over native fishing. Certainly if, as appellants urge, Congress desired to re-

[16] The relevant portion of that section reads:

"(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: *Provided*, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest . . ."

tain control over such a substantial portion of the total fishery, it would have specified that desire in the very section which provides for termination of the function. Indeed, if a major segment of Alaska's fisheries was to be alienated from public control, it became incumbent on Congress to so specify in the clearest of language. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 at 105 (1949). That language is conspicuously absent.

Equally important is the fact that Sec. 6(e) provides that all property previously used by the Federal Government in the conservation and protection of the fish and wildlife of Alaska was to be turned over to the new state. No exceptions were made for property used in the regulation and control of a native fishery. It is hardly reasonable to believe that Congress sought to retain in the Government the authority to regulate nearly one-half of Alaska's fishermen, and at the same time required the Government to dispose of all properties necessary to that work.

A limited interpretation of Sec. 4, as suggested by the appellees, is entirely consistent with the broad termination of federal authority over management in Sec. 6(e). For the special rights preserved in Sec. 4 do not entail a federal management of the fisheries. While Metlakatla will be subsequently discussed, it is important for the sake of example to at least touch on its "rights" presently. Metlakatla had reserved to it under the Statehood Act an area in which only Metlakatlans were permitted to fish. In retaining jurisdiction over that right, the Government's activity will be that of insuring that the area remains exclusive—not of regulation. In the case of aboriginal rights (though none exist here), the Government's

function, by the very nature of aboriginal rights, will be that of insuring that those rights are not interfered with by third parties. These functions do not involve a comprehensive management and conservation program, such as would be necessary were the control of all native fishing reserved, in the Federal Government.

To read Sec. 4, then, as a broad grant of regulatory authority over Indian fishing to the Federal Government is inconsistent with other portions of the Statehood Act itself. It follows that Congress did not intend to retain such broad authority, but instead intended to retain control over certain specified rights—none of which are in issue here.

(4) Appellants' urged interpretation of Sec. 4 would nullify any attempt to adequately conserve Alaska's fisheries

As a last indication of the proper interpretation of Sec. 4, it is important to consider the effect of the interpretation claimed by appellants. While it is not a function of this Court to pass on the wisdom of an Act of Congress, it is at least reasonable to assume in interpreting a congressional act that Congress did not intend an absurd result. *Helvering* v. *New York Trust Co., Trustee,* 292 U.S. 455, 464-5 (1934); *Ozawa* v. *United States,* 260 U.S. 178, 194 (1922).

If appellants' contentions are correct, there is a dual sovereignty over fishing in Alaska. The State has full regulatory power over its white citizens, while the Federal Government has full regulatory authority over natives, each to the exclusion of the other. The difficulty with this dual sovereignty is that both natives and whites fish in the same water, at the same time. No one in Alaska is restricted to a particular area for fishing.

The effect of such a dual sovereignty may be clearly seen by hypothesizing a typical regulatory situation. One of the primary functions of salmon conservation is to insure that a required number of fish escape the commercial gear and enter the streams to spawn, insuring the continuation of the resource. To insure this fact, the State imposes closed fishing periods during the runs—periods in which salmon are unobstructed in their attempts to reach their spawning beds. It is obvious that unless all fishermen are bound by such a closure, the conservation attempt will fail. If half the fishermen can fish, it will simply mean that they take twice the fish that they would if other fishermen were not barred—salmon will still be unable to reach the streams. The result of such a halfway measure is that the conservation system becomes completely ineffective. The resource becomes depleted because it cannot be adequately managed.

This is exactly the result that appellants' suggested interpretation implies. If native fishermen are to be free of state regulation, it means that one-half of the State's fishermen are not bound to respect state regulations. The State will be helpless to protect itself from a depletion of its own resource.

This Court has previously had occasion to consider a similar situation of dual sovereignty over fisheries. In *New York ex rel. Kennedy* v. *Becker,* 241 U.S. 556 (1916), it was proposed that the interpretation of a treaty with the Seneca Indians be that the state would regulate fishing by the whites and the tribe would regulate its members fishing under treaty right on the same land. The Court stated:

> "... It is said that the state would regulate the whites and that the Indian tribe would regulate

its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both."

It was held that the tribe was subject to state regulation.

Should this Court adopt the limited interpretation of Sec. 4 suggested by the appellees, Alaska's control of its natural resource is secure. While certain native fishing rights are reserved from state control, they are at least not of the type which would conflict with the state's management duties. Generally, Alaska will be free to regulate its resource for the benefit of all its people.

B. IN THE ABSENCE OF EXPRESS RESERVATION IN THE STATEHOOD ACT, ALASKA FISHERIES REGULATIONS APPLY TO KAKE AND ANGOON AS WELL AS OTHER ALASKANS

Assuming that appellees' construction of Sec. 4 of the Statehood Act is valid, and the regulation of all native fishing was not reserved to the Federal Government, the only question remaining is that of whether through its admission to the Union, Alaska itself gained the power of regulation. There can be little doubt that it did.

It is firmly established that the regulation of fish and game resources is an essential attribute of state power. *Geer* v. *Conn.*, 161 U.S. 519 (1896); *Lawton* v. *Steele*, 152 U.S. 133 (1894). The power extends to all citizens of the State, Indian or white, in the absence of valid federal action forbidding such jurisdiction. *Ward* v. *Race Horse*, 163 U.S. 504 (1895); *United States* v. *Brooks*, (N.D. Ind. 1940), 32 F. Supp. 422 at

427. Indeed, even if the Federal Government acts to set aside certain fishing rights for Indians, through treaty or congressional act, the State is still free to regulate the exercise of those rights so long as the regulation is not inconsistent with the exercise of the right itself. *Tulee* v. *State of Washington,* 315 U.S. 681 (1942); *United States* v. *Winans,* 198 U.S. 371 (1905).

That such broad powers over fisheries management are similarly held by Alaska subsequent to admission is a natural concomitant of the equal footing doctrine. That doctrine prescribes that upon admission to the Union, each state assumes equal sovereign powers with the states which have preceded it. *Pollard* v. *Hagan,* 44 U.S. (3 How.) 212, 228-9 (1845). While the doctrine is judicial in nature, it is significant that Congress specifically affirmed Alaska's admission "on an equal footing" in Sec. 1 of the Statehood Act.[17] There can be no question, then, that Alaska entered the Union with full sovereign powers, including that of fisheries regulation.

The appellees recognize that the equal footing doctrine is not without certain limitations. In particular, Congress may restrict the scope of state jurisdiction in an act admitting the state to the Union, so long as the restriction is otherwise within the constitutional powers of the Federal Government. *Coyle* v. *Smith,* 221 U.S. 559 (1911). The restriction's validity does

[17] "[Sec. 1. **Declaration; acceptance, ratification and confirmation of Constitution**] Subject to the provisions of this Act, . . . the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal **footing with the other States in all respects whatever** . . ." Act of July 7, 1958, 72 Stat. 339.

not depend on the act of admission itself, but solely because the power of Congress extends to the subject.

To narrow the issues in controversy, the appellees will assume for purpose of argument that Congress could have, if it desired, withdrawn regulation of all native fishing from state control without violating the equal footing doctrine. An inequality would have been produced in that no other state has had its regulatory authority so drastically withheld, but it would not be the sort of legal inequality contemplated by the equal footing doctrine.

However, regardless of what Congress *could* have done, it did not retain general regulatory authority over natives fishing anywhere in the State. The effect of Sec. 4 has already been noted—its interpretation is narrow, and does not remove general regulatory authority from the State. Nowhere else in the Statehood Act is any reservation of any federal control whatsoever over natives specified. The conclusion follows that the terms of the Statehood Act do not withhold the regulation of native fishermen from the State. Indeed, the congressional affirmation in Sec. 1 that Alaska was to be admitted to the Union on an equal footing with the rest of the states indicates that the effect of the Act was to expressly confer that jurisdictional authority on the State.

This Court has held that in the absence of specific reservation of past federal or tribal control, full regulatory power over Indian fishing passes to the State upon admission. In *Ward* v. *Race Horse,* 163 U.S. 504 (1895), the Act admitting Wyoming to the Union had made no mention of a previous treaty right held by the Bannock tribes to take game "upon the unoccupied lands of the United States." The Act did state that

Wyoming was to be admitted to the Union "on an equal footing with the original States in all respects whatsoever." 26 Stat. 222 (1890). The absence of an express savings clause, together with the equal footing provision, was held to abrogate the treaty rights. To imply a continuation of those rights, the Court noted, would be to disregard the presumption that Congress intended to admit the State with full governmental authority.

The application and theory of *Race Horse* is of striking clarity here. First, like *Race Horse,* the Alaska Statehood Act did not reserve general regulatory authority over Indian fishing to the Federal Government—only specified regulatory authority over rights which are not in issue here. Second, like the Wyoming Act of Admission, there is an express congressional affirmation that the State of Alaska is to be admitted on an equal footing with other states, if indeed such an express statement was necessary.

The rationale of *Race Horse* becomes even stronger when it is recognized that unlike that case, which involved the preservation or abolition of a solemn treaty right, this case involves no previously created rights whatsoever.

It is not necessary to consider here whether subsequent to the admission of Alaska as a state, Congress could once again assume jurisdiction over native fishing which it had delegated to the State. The question is academic. Congress has taken no action since the adoption of the Statehood Act which could in any way be interpreted to mean that they desired to regulate native fishermen in Alaska. Indeed, the Secretary of the Interior, who is responsible for the regu-

lations authorizing these traps, predicated his action on the White Act, as amended by Sec. 4 of the Statehood Act—not on any subsequent expression of congressional policy (S.R. 85, 104-5, 131-2). If the appellees' interpretation of the Statehood Act is correct, it is quite apparent that the White Act no longer has any application to the general management of Alaska's commercial fisheries and the Secretary's regulations are without legal foundation.

Kake and Angoon, and their occupants, are full Alaskan citizens. As such, they are fully subject to state conservation laws—laws on which not only their, but all Alaska's future depends. In an effort to cease further depletion of the salmon runs, the State has imposed a ban on fish traps. Kake and Angoon cannot be permitted to enrich themselves at the expense of their fellow citizens. Their particular interests must yield before the paramount interest of the State as a whole.

II. THE STATE OF ALASKA HAS FULL JURISDICTION OVER COMMERCIAL FISHING IN THE METLAKATLA RESERVE

Introduction

Most of the previous argument has full application to Metlakatla as well as Kake and Angoon. However, there are certain distinctions between Metlakatla and the other appellants which necessitate separate treatment.

The Metlakatla situation varies from that of Kake and Angoon in several respects. First, it does not involve a federal claim to total jurisdiction over all natives fishing anywhere in Alaska. Rather, the concern is with a particular and unique fisheries reserve

set up by the Government prior to statehood, and the effect of state law upon fishing in that reservation. Metlakatla freely concedes that state fisheries regulations are fully applicable to Metlakatlans while fishing outside the confines of the reserve (MEBR 12). Second, the situation differs in that, unlike Kake and Angoon, the exclusive right to fish within the Metlakatlan fisheries reserve can reasonably be termed a "native fishing right" within the meaning of Sec. 4 of the Statehood Act.

But this admission merely forms the question—it does not decide it. For the real issue is the nature of the right preserved to the Metlakatlans by Sec. 4 of the Statehood Act. The appellees contend that the right preserved went only to the *area* of reservation, and in no way involved the manner or means of fishery.

A. SECTION 4 OF THE ALASKA STATEHOOD ACT DOES NOT BAR APPLICATION OF STATE LAW PROHIBITING THE OPERATION OF FISH TRAPS TO METLAKATLA

It is clearly within the power of the Federal Government to create Indian reservations within a state or territory which will be free of all local regulatory authority. *Worcester* v. *Georgia,* 6 Pet. 515; *Williams* v. *Lee,* 358 U.S. 217 (1959). Furthermore, the Government is free to continue the existence of any such reservation past the time of a state's admission without violating the equal footing doctrine. If Metlakatla is such a reservation, it has a free right to use fish traps, or for that matter any other form of fishing gear free of state regulation.

However, the Federal Government has never been bound to create the same type of reservations for all Indian peoples. The Government is free to create reservations under any terms it deems proper. *Mis-*

souri, Kansas and Texas R'y. Co. v. *Roberts,* 152 U.S. 114 (1894) (granting rights of way across tribal land); *Buttz* v. *The Northern Pacific Railroad Co.,* 119 U.S. 55 (1886) (same); Op. Sol. I.D.M. 14237, Dec. 23, 1924 (granting states power to tax); COHEN, HANDBOOK OF FEDERAL INDIAN LAW, pp. 95-96 (1945). It may grant state jurisdiction over Indians or it may refuse to grant it. E.g. 62 Stat. 1224, 64 Stat. 845, 25 U.S.C., Secs. 232, 233 (1952) (granting civil and criminal jurisdiction to N. Y.); 68 Stat. 795, 18 U.S.C., Sec. 1162 (Supp. 1957) (granting criminal jurisdiction over reservations to certain states). An investigation of Metlakatla's rights, therefore, must proceed initially from a determination of what rights were created by the Federal Government prior to statehood, through creation of the Metlakatla reserve.

The Metlakatlans were originally a branch of the Tsimshian Indian tribe of British Columbia. Some 800 of these Indians emigrated from British Columbia to Annette Island in Southeastern Alaska in 1886 and established the community of Metlakatla. *Alaska Pacific Fisheries* v. *United States,* 4 Alas. Fed. 709, 711, 248 U.S. 78 at 86 (1918). In 1891, Congress enacted legislation which set aside the body of lands known as the Annette Islands as a reservation for the use of Metlakatlans and such other Alaskan natives as might care to join them. 26 Stat. 1101, 48 U.S.C.A., Sec. 358 (1952). On April 28, 1916, President Wilson issued a proclamation declaring the waters within 3,000 feet of the shore at mean low tide of Annette and adjacent small islands as a reservation for the Metlakatlans and such other Alaska natives as had or might join them, "... *to be used under general fisheries laws and regulations* ..." (Emphasis supplied.) Presi-

dential Proc. No. 1332, April 28, 1916, 39 Stat. 1777. The validity of the exclusive nature of the reservation was upheld by this court. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918). Congress, in 1934, affirmed the reservation *under the terms that it then existed,* subject to future modification. Act of May 7, 1934, Ch. 221, Secs. 1-2, 48 Stat. 667 (now covered by 8 U.S.C.A., Sec. 1401 (1952)).

This series of enactments creates the total substance of Metlakatla's rights. The Metlakatlans were granted an area in which they alone could fish. But the right was limited by the specific federal directive that all fishing done within the area was to be under general fisheries regulation.

It is not surprising that the Metlakatlan reservation, unlike the vast majority of federal Indian reservations, was fully subject to the uniform scheme of fisheries regulation. First, the fishery in which the Metlakatlans engage is commercial. Where a subsistence fishery is preserved by creation of a reservation, the needs of the population provide a natural limitation on the use of the resource, and no governmental control is necessary But where commercial fisheries are concerned, the natural desire of people to make as much money as possible often precludes a self-imposed conservation policy, and artificial controls are necessary. Second, if Metlakatlans were allowed to fish on their reservation without regard to conservation they would not only be hurting themselves, but substantial numbers of fishermen outside of the reservation. The salmon taken in Metlakatla's reserve are, for the most part, not Metlakatlan salmon. They are salmon spawned in streams outside the reserve, protected by money from state funds paid by all

citizens, who now seek to return to their original streams to spawn. In doing so, they pass through the Metlakatlan reserve.

In realization of these facts, it is entirely realistic that the Federal Government insisted that the exclusive fishing reserve be only exclusive as to trespass, and not free of general fisheries regulation. For a conservation program to succeed, all must be equally bound or the entire program may fail. *Missouri* v. *Holland*, 252 U.S. 416 (1920).

During the entire history of the reserve's existence, the fishing within it, while undertaken exclusively by Metlakatlans, has been under the same regulatory scheme as the entire fishery. No exceptions have been made. The Metlakatlans had no greater rights to fish in unique manner, and in particular to use traps, than did other Alaskans.

Assuming then that Sec. 4 of the Statehood Act did operate to divest the State of control over any fishing *right* possessed by the Metlakatlans, what did that divestiture entail? Since the only right possessed by the Metlakatlans was that of forbidding other fishermen to enter their reserve, it appears that Sec. 4 preserved that right. The State, therefore, is not free to authorize entry into the reservation. But the State, like the Federal Government before it, does have the right to prescribe the *means* by which fish may be taken within the reservation. The Metlakatlans possessed no right prior to statehood to be free of regulation, and they cannot claim to have had a non-existent right preserved.

While this Court has never been presented with a situation completely similar to this, it has had occasion

to pass on certain analogous situations. When a right of fishery has been reserved to Indians at a specified place, the Court has uniformly held that in the absence of specific federal protection, the right was subject to valid state regulation. In *Tulee* v. *Washington,* 315 U.S. 681 (1942) the Court considered the effect of a treaty provision reserving to Indians the right to take fish "at all usual and accustomed places in common with the citizens" of Washington. The Court held that the treaty left with the state "power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing . . ." Similarly, in *United States* v. *Winans,* 198 U.S. 371, the Court recognized the right of the state to validly regulate those treaty rights which had not, by federal action, been excluded from their control. In *New York ex rel. Kennedy* v. *Becker,* 241 U.S. 556 (1916), in considering a fishing right granted by treaty, it was held:

> ". . . [T]he clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised. . . ." Id. at 563-4.

It is true that all of the above cited cases dealt with Indians fishing outside of the confines of a reservation. But the location itself is not crucial *unless the Federal Government makes it so.* In the case of Metlakatla, Congress only granted to Metlakatla the right to exclusive use of their area. The Government never granted to the Metlakatlans a freedom from regula-

tion. The extent of Metlakatla's right, then, is similar to a treaty right which grants Indians the right to take fish in a particular place ("at all accustomed places" is the usual terminology). But this analogous right is subject to state regulation, and so is that of Metlakatla.

The nature of the Metlakatlan "reservation" cannot be too strongly emphasized. It is not, and has never been treated as what is normally termed an Indian reservation. Residents of the Annette Island Community are a mixed group composed of descendants of the Tsimshian Indians, Aleuts and Eskimos. There is no tribal organization. Residents are trained technicians to a large extent—many servicing the airport, which is one of the most important in Southeastern Alaska (Op. 60). The fisheries fleet is not restricted to taking salmon in the "reserve" but extends to all Southeast Alaskan waters, and other fisheries than salmon (Op. 60). Schools within the area are furnished by the State (Op. 60). The residents have always paid state income taxes, school taxes, gasoline taxes, and generally all forms of state taxes paid by other residents of Alaska (App. B). Prosecution for crimes is handled in all respects as though there was no reservation. *United States* v. *Booth,* 17 Alaska 561, 161 F. Supp. 269 (D. Alas., 1958). When the area has been economically depressed, state funds have been allocated to it as they have to other communities similarly situated. (App. C.)

The Alaska Supreme Court in full recognition of the complete fusion of Metlakatla into the Alaskan community as a whole, held that the reservation did not survive the admission of Alaska into the Union. It is not necessary to draw such a forceful conclusion.

It is only necessary to fully recognize the status of the "reservation" before statehood and apply relevant legal theory—not theories which may be applicable to Indian reservations elsewhere, set up under different terms, and given different historical treatment. It was the Federal Government's prerogative to set up the Metlakatla fishing reserve as it saw fit. The decision of the federal authorities was to have the fishing within the reserve regulated under a uniform system of regulation—not to grant the Metlakatlans any rights to fish in a particular *manner* and at a particular time. It would be in complete disregard of this clearly established congressional policy to hold that in Sec. 4 of the Statehood Act, Congress meant to relegate Metlakatla to the status of an aboriginal Indian reservation. If rights were preserved by that section, the only right, consistent with congressional policy, can be that of refusing entrance to nonresidents of the community. But the Metlakatlans' fishing is subject to state law, and that law forbids the use of traps.

B. THE STATE'S REGULATION OF FISHING WITHIN THE METLAKATLA RESERVE DOES NOT CONFLICT WITH THE SUPREMACY CLAUSE

(1) State regulation of fishing in the Metlakatla reserve has not been preempted by federal legislation

Appellant urges this Court to hold that state regulation of fishing on the Metlakatlan reserve is void under the doctrine of preemption (MEBR 34). In support of this contention, Metlakatla suggests that an irreconcilable conflict has arisen between two sovereigns—the State forbidding traps, and the Secretary permitting them. As a result of this "conflict," state power must yield to federal authority.

The fallacy in this argument is that the will of the Secretary does not constitute the will of the Govern-

ment. The Secretary has not based the regulations on his own desires, but on what he believes to be the will of Congress as expressed in Sec. 4 of the Statehood Act. If Sec. 4, as suggested by appellees, did not reserve jurisdiction over the entire fishing process of the Metlakatlans to the Federal Government, but instead only reserved jurisdiction to keep the water area exclusive, it follows that the Secretary's interpretation is invalid and no question of preemption arises. There must be a clear and unequivocal expression of congressional will by Congress if state powers are to be preempted. *Cohens* v. *Virginia,* 6 Wheat 264, 443; *Reid* v. *Colorado,* 187 U.S. 137, 148 (1902). Here, there is no expression of congressional will which in any way conflicts with state law. In the absence of a clear conflict, state law must prevail.

(2) State regulation in the Metlakatla reserve does not constitute interference with a federal instrumentality

As a corollary to its argument of federal preemption, Metlakatla claims complete immunity from state fishing regulations on the grounds that such regulations constitute interference with a federal instrumentality. In support of its claim of broad immunity, appellant cites *Alaska* v. *Annette Island Packing Co.,* 289 Fed. 671 (9th Cir. 1923), holding that Territorial occupation taxes could not be imposed upon a private cannery operating within the confines of the reserve (MEBR 35). The case never reached this court, and its holding appears to have been expressly repudiated in *Oklahoma Tax Comm'n* v. *Texas Co.,* 436 U.S. 342 (1949).

Appellees do not question the principle that a state is forbidden to interfere with the operation of a fed-

eral instrumentality. However, the immunity extends only so far as is necessary to protect the federal function. *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376 (1938); *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937). Assuming that the federal purpose in establishing the Metlakatla reserve was to aid the Metlakatlans in becoming self-sufficient, the Government selected a particular means to accomplish this result. It set aside for the community a section of Alaskan waters in which they alone could fish—a valuable contribution to the economy of the community. However, the Government did not go so far as to free the Metlakatlans from fishing regulations applicable to all of Alaska. The Metlakatlan economy has always been subject to "interference" from fishing restriction, under the obvious theory that regulation for conservation is not interference at all, but is directed at improving the economy in the long run. When the Alaskan fishing season was closed, Metlakatla was similarly forbidden to fish. When the number of fish traps in the State were curtailed, Metlakatla's traps were similarly reduced. It is difficult to understand how state regulation of fishing within the water reservation interfers with federal policy, if it has always *been* federal policy to regulate the reserve under general fisheries regulations. Regulation of the means of fishing is entirely consistent with the growth and development of the federal instrumentality, much as it is consistent with the development with the entire fishing effort in the State.

The real basis of Metlakatla's argument of interference with a federal instrumentality seems to be that if fish traps are abolished, the community will be faced with an economic adjustment due to the

decreased number of fish available for their cannery. The Alaska Supreme Court both challenged the Metlakatlan claim and minimized its impact:

> "Appellants have pointed out that sizeable balances remain unpaid on government loans which financed the purchase of traps, canneries, boats and related gear. They also argue that the loss of trap fishing privileges will seriously affect their economy. It appears from the record that there is a sufficient number of independent seine boats in Southeastern Alaska to supply appellants' canneries. If not, the vacuum will undoubtedly be filled within a very short time. We are not convinced that the over-all economy of appellant communities will suffer. On the contrary, there is every reason to believe that the economy of the individual fisherman will be improved. Financial adjustments on loan repayments may be necessary. Adjustment has already taken place in the salmon industry generally. Private enterprise has been required to make radical financial and physical adjustments patterned as nearly as possible to the state's flexible plan for the conservation and rebuilding of the salmon resource." (Op., 62-63.)

While federal policy may strive to place native wards on a substantially equal basis with their fellow citizens, federal policy has never sought to create super-citizens out of natives. All Alaskans, native and white, have had to adjust to the fact that the future needs of the State require that the present drain on the salmon resource be curtailed. It would be a distortion of the aims of federal native policy, particularly in Alaska, for one community of natives to be free to reap the benefits of the deprivation of all other citizens. Metlakatla, as an Alaskan community, must share the

duties as well as the benefits of state law. Temporary inconveniences must be subordinated to a policy dedicated to preventing exploitation to annihilation of Alaska's greatest resource.

CONCLUSION

For the foregoing reasons, it is submitted that the judgments below should be affirmed.

Respectfully submitted,

RALPH E. MOODY
Attorney General of Alaska

AVRUM M. GROSS
Assistant Attorney General

Attorneys for Appellees

APPENDIX A

Statutes Involved

1. ALASKA STATEHOOD ACT, Sec. 1, 72 Stat. 339:

"[Sec. 1. *Declaration; acceptance, ratification and confirmation of Constitution*] Subject to the provisions of this Act, . . . the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, . . ."

2. ALASKA STATEHOOD ACT, Sec. 4, 72 Stat. 339:

"As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided*, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be con-

strued as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further,* That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation."

3. ALASKA STATEHOOD ACT, Sec. 6(e), 72 Stat. 340-341:

"(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: *Provided,* That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days ofter the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and

conservation of said resources in the broad national interest . . ."

4. ALASKA OMNIBUS ACT, Sec. 2, 73 Stat. 141:

"(a) Section 4 of the Act of July 7, 1958 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words 'all such lands or other property, belonging to the United States or which may belong to said natives', and inserting in lieu thereof the words 'all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives'.

"(b) Section 6(e) of said Act is amended by striking out the word 'legislative' and inserting in lieu thereof the word 'calendar'."

5. WHITE ACT, Sec. 1, 43 Stat. 464, amended 44 Stat. 752, 48 U.S.C., sec. 221:

"Section 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited

therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided,* That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. . . ."

6. TREATY OF CESSION, Art. VI, 15 Stat. 539:

"In consideration of the cession aforesaid the United States agree to pay at the treasury in Washington, within ten months after the exchange of the ratifications of this convention, to the diplomatic representative or other agent of his Majesty the Emperor of all the Russias, duly authorized to receive the same, seven million two hundred thousand dollars in gold. The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made, conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto."

7. PRESIDENTIAL PROCLAMATION No. 1332, April 28, 1916, 39 Stat. 1777:

"* * *

"WHEREAS the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and

"WHEREAS it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery,

"Now, therefore, I, WOODROW WILSON, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

"Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned."

8. Act of May 7, 1934, Sec. 3(c), 48 Stat. 667:

"The granting of citizenship to the Indians described in Section 3(b) of this title shall not in any manner affect the rights, individual or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakatla Colony. And any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to the modification, alteration, or repeal by the Congress or the President, respectively."

9. Session Laws of Alaska 1959, Ch. 17, Sec. 1, as amended by Session Laws of Alaska 1959, Ch. 95:

"Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or waters owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska."

10. Session Laws of Alaska 1959, Ch. 95, Sec. 1:

"Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; provided nothing in this section shall prevent the operation of small hand-driven fish traps of the type ordinarily used on rivers

of Alaska which are otherwise legally operated in or above the mouth of any stream or river in Alaska; nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives."

11. C.F.R., Tit. 25, Ch. 1(H), Part 88.2 (Supp. 1961):

"§ 88.2 *Restrictions on Indian fish traps.*

"(a) Subject to the limitations of paragraph (e) of this section, not more than twenty-one salmon fish traps may be, but are not required to be, utilized for the purpose of salmon trap fishing by Indian villages. Such fish trap operations, if the natives elect to engage in them, shall be conducted as heretofore only at sites hereinafter described, and within the fishing districts and fishing sections defined in the 1960 edition of the Regulations of the Alaska Board of Fish and Game for Commercial Fishing in Alaska.

"(b) Angoon Community Association: Salmon trap fishing is permitted, but not required, at the following sites within the southern section of the western district when any salmon purse seine fishing is permitted by the State of Alaska in the southern section of the western district:

"(1) Chicago Island at 57°36'16" north latitude, 134°51'34" west longitude.

"(2) Admiralty Island at 57°22'28" north latitude, 134°34'18" west longitude.

"(3) Killisnoo Island at 57°28'15" north latitude, 134°36'35" west longitude.

"(4) Admiralty Island at 57°13'52" north latitude, 134°39'05" west longitude.

"(c) Organized Village of Kake: Salmon trap fishing is permitted but not required, at the following sites within the General Section of the eastern district when any salmon purse seine fishing is permitted by the State of Alaska in the General Section of the eastern district:

"(1) Stephens Passage at 57°21'20" north latitude, 133°27'02" west longitude.

"(2) Frederick Sound at 57°11'27" north latitude, 133°34'02" west longitude.

"(3) Frederick Sound at 57°10'52" north latitude, 133°32'44" west longitude.

"(4) Admiralty Island at 57°18'40" north latitude, 133°57'21" west longitude.

"(5) Admiralty Island at 57°10'29" north latitude, 134°12'53" west longitude.

"(6) Herring Bay at 57°07'21" north latitude, 134°19'45" west longitude.

"(7) Admiralty Island at 57°04'02" north latitude, 134°25'20" west longitude.

"(8) Kupreanof Island at 57°01'23" north latitude, 134°02'50" west longitude.

"(9) Kuiu Island at 56°55'52" north latitude, 134°16'08" west longitude.

"(d) Metlakatla Indian Community (Annette Island Fishery Reserve): Salmon trap fishing is permitted, but not required, at the following sites within the southeast section of the Clarence Strait District

from the opening date set by the State of Alaska for any salmon purse seine fishing in the General Section of the southern district to the closing date set by the State for any salmon purse seine fishing in the southeast section of the Clarence Strait District, or one week following the closing date set by the State for any salmon purse seine fishing in the General Section of the southern district, whichever date is later:

"(1) Annette Island at 55°15′09″ north latitude, 131°36′00″ west longitude.

"(2) Annette Island at 55°12′52″ north latitude, 131°36′10″ west longitude.

"(3) Annette Island at 55°02′47″ north latitude, 131°38′53″ west longitude.

"(4) Annette Island at 55°05′41″ north latitude, 131°36′39″ west longitude.

"(5) Annette Island at 55°01′54″ north latitude, 131°38′36″ west longitude.

"(6) Annette Island at 55°00′45″ north latitude, 131°38′30″ west longitude.

"(7) Annette Island at 54°59′41″ north latitude, 131°36′48″ west longitude.

"(8) Ham Island at 55°10′13″ north latitude, 131°19′31″ west longitude.

"(e) During the 1960 fishing season and until the Secretary or his authorized representative determines otherwise, and if the villages elect to operate any fish traps, the villages may operate traps only at the following sites: Angoon: (1), (2), and (4); Kake: (3), (4), (8), and (9); Metlakatla: (2), (3), (4), and (6)."

APPENDIX B

DEPARTMENT OF REVENUE
STATE OF ALASKA
JUNEAU

November 27, 1961

The Honorable Ralph Moody
Attorney General
P. O. Box 2170
Juneau, Alaska

Attention Avrum Gross
Assistant Attorney General

Dear Mr. Moody:

Re Metlakatla Community Taxes

In reply to your inquiry regarding the liabilities of the citizens of the Metlakatla Community for State taxes, the Department of Revenue treats them the same as any other individual citizen in Alaska. They are subject to the individual income tax, school tax and inheritance tax. If they are engaged in business, even though the place of business is located within the Metlakatla Community limits, they are liable for business license and gross receipts tax. If they have coin operated devices in their place of business, they become liable for the amusement and/or gaming device tax. They are required to purchase motor vehicle licenses and motor vehicle drivers licenses and to pay motor fuel tax like any other citizen.

Historically, they have been treated like all other citizens in Alaska and are subject to all State tax laws without any exceptions.

Sincerely yours,

/s/ Peter Gatz
Peter Gatz
Commissioner

APPENDIX C

STATE DEPRESSED AREA FUNDS ALLOCATED TO APPELLANTS

To: Governor William A. Egan

From: Robert F. Hoffman
Director of Rural Development

Subject: Governor's Work Projects
for Depressed Areas

November 16, 1960

Community	($50,000) 1958-59	($200,000) 1959-60	($155,000) 1960-61
Angoon	$ 8,000	$10,000	$ 8,000
Craig	8,075	10,000	8,000
Hydaburg	8,050		10,000
Hoonah	8,000	10,000	
Klawock	8,075	10,000	8,000
Kake	8,000	10,000	8,000
Yakutat	2,300		3,500
Haines		10,000	
Klukwan		5,000	
Saxman		8,000	4,000
Wales		3,000	
Wainwright			3,000
Kotzebue		7,500	
Elim		3,000	
Kaltag		3,000	
Koyuk		3,000	
Teller		3,000	
Cordova		10,000	
Valdez		10,000	
Kodiak		10,000	
Tyonek		6,000	
Teller Mission		3,000	
White Mountain		3,000	
Holy Cross		3,000	
Unalaska		2,500	
Fort Yukon		3,000	
Fortuna Ledge		2,500	
Nightmute		2,500	

Community	($50,000) 1958-59	($200,000) 1959-60	($155,000) 1960-61
Chefornak		2,500	
Kipnuk		2,500	
Eek		2,500	
Bethel		7,500	
Unalakleet		7,500	
Eagle		3,000	
Hooper Bay		5,000	
Shaktoolik			2,000
Metlakatla			8,000
Wrangell			6,000

APPENDIX D

SOUTHEASTERN ALASKA CATCH BY GEAR
1951-1961 in Number of Fish

CATCH SUMMARY

All Gear	# of Units	Kings	Reds	Cohos	Pinks	Chums
1951		474,360	819,621	3,310,226	22,220,113	4,123,010
1952		528,407	919,316	1,743,753	9,802,657	4,178,549
1953		498,345	1,376,454	1,163,581	4,981,409	3,541,901
1954		397,620	1,220,157	1,770,807	8,909,481	4,243,671
1955		373,552	747,330	1,338,477	9,333,972	1,528,202
1956		239,148	920,778	916,542	13,728,271	2,701,261
1957		300,046	1,071,257	1,218,479	6,857,895	3,413,051
1958		325,154	1,008,235	955,349	9,837,907	2,787,025
1959		364,740	890,638	1,024,390	7,851,298	1,291,409
1960		309,989	588,288	720,808	2,985,021	1,019,152
*1961		228,262	744,537	884,455	12,635,909	2,558,451

CATCH BY GEAR

Trap	# of Units	Kings	Reds	Cohos	Pinks	Chums
1951	252	1,029	278,359	821,696	14,794,634	1,622,396
1952	205	583	297,304	344,941	5,316,827	1,329,138
1953	256	1,960	563,666	268,321	2,621,746	907,072
1954	118	1,450	325,017	193,735	4,619,918	781,069
1955	113	1,344	198,725	166,991	4,080,050	343,344
1956	122	5,775	295,773	148,941	6,153,690	571,276
1957	123	2,363	310,952	132,938	2,179,618	620,958
1958	146	2,204	394,954	170,098	5,343,907	800,506
1959	11	17	18,460	7,887	384,404	17,576
1960	11	48	13,146	3,723	156,442	14,415
*1961	11	27	18,906	9,373	951,750	42,420
Purse Seine						
1951	462	1,751	144,498	228,150	7,061,833	2,423,416
1952	549	1,625	277,512	125,477	4,335,543	2,695,388
1953	457	4,921	402,034	146,493	2,289,907	2,375,347
1954	389	9,449	427,668	107,923	4,010,928	3,129,072
1955	636	9,872	228,377	91,346	5,087,740	997,981
1956	437	4,701	348,784	124,825	7,422,036	1,930,352
1957	450	3,975	456,155	124,611	4,592,725	2,107,892
1958	505	5,330	337,996	112,575	4,214,872	1,604,947
1959	482	4,549	542,140	185,046	7,208,811	891,609
1960	512	6,799	378,740	133,096	2,726,298	777,681
*1961	500	5,791	433,045	257,115	11,236,754	2,212,446
Beach Seine						
1951	23		100	3,627	32,004	4,868
1952	31		153	2,708	9,894	14,869
1953	29		1,267	1,840	3,331	35,757
1954	35		374	2,113	23,360	32,257
1955	34	2	204	1,145	11,255	7,311
1956	18		56	880	10,598	7,985
1957	10		1,387	577	1,140	12,431
1958	17		283	462	2,456	5,675

*All 1961 figures are preliminary.
1961 Units of gear estimated

Source: Alaska Department of Fish and Game

SOUTHEASTERN ALASKA CATCH BY GEAR
1951-1961 in Number of Fish

Gill Nets	# of Units	Kings	Reds	Cohos	Pinks	Chums
1951	598	20,400	394,700	254,100	163,762	
1952	944	79,323	343,913	287,018	106,227	
1953	1336	28,812	408,777	259,143	44,132	
1954	1113	42,613	465,157	417,591	152,058	
1955	1616	36,374	319,266	329,561	97,660	
1956	1142	31,220	275,897	233,689	63,745	
1957	785	24,375	301,279	165,644	40,026	
1958	935	31,699	274,758	197,890	226,264	
1959	759	41,686	329,877	264,291	202,769	
1960	673	20,464	195,464	187,787	76,729	
*1961	625	19,444	291,286	222,967	428,405	
Troll	**Units**					
1951	1903	451,180	1,964	2,002,653	167,880	
1952	1965	446,876	434	983,609	34,166	
1953	1694	462,652	710	487,784	22,293	
1954	1697	344,108	1,941	1,049,445	103,217	
1955	1727	325,960	758	749,434	57,267	
1956	1396	197,452	268	408,207	78,202	
1957	1976	269,333	1,484	794,709	44,386	
1958	2731	285,921	244	474,324	50,408	
1959	2013	318,488	161	567,166	55,314	
1960	1508	282,678	938	396,202	25,552	
*1961	1500	203,000	1,300	395,000	19,000	

*All 1961 figures are preliminary.
1961 Units of gear estimated

Source: ALASKA DEPARTMENT OF FISH AND GAME

SUPREME COURT OF THE UNITED STATES

Nos. 326 and 327.—October Term, 1959.

Metlakatla Indian Community, Annette Island Reserve, Appellant,	
326 v.	
Egan, Governor of Alaska, et al.	On Appeals from the District Court for Alaska.
Organized Village of Kake, et al., Appellants,	
327 v.	
Egan, Governor of Alaska.	

[June 20, 1960.]

Mr. Justice Frankfurter delivered the opinion of the Court.

These consolidated cases were commenced on June 22 and 24, 1959, in the interim District Court for Alaska, by complaints seeking permanent injunctions against threatened enforcement by the new State of Alaska, its Governor, and other agents, of an Alaska statute (17 S. L. A. 1959, as amended, 95 S. L. A. 1959) making it a criminal offense to fish with traps. The statute was assailed on the ground that it was in conflict with applicable federal law. On July 2, 1959, orders were entered denying the injunctions, dismissing the complaints with prejudice, and denying an injunction pending appeal to this Court. 174 F. Supp. 500. On July 11, 1959, Mr. Justice Brennan, acting in his capacity as a circuit justice, granted appellants' application for an injunction pending final disposition of their future appeals to this Court. His opinion noted the existence of substantial questions, both as to our jurisdiction and the merits. 80 S. Ct. 33. The notices of appeal were filed on August 6, 1959; on Decem-

ber 7, 1959, we postponed further consideration of the question of jurisdiction to the hearing of the cases on the merits. 361 U. S. 911.

If the orders rendered on July 2, 1959 were those of the "highest court of a State in which a decision could be had," the appeals are within our jurisdiction under 28 U. S. C. § 1257 (2), since the court below sustained a statute of the State of Alaska against a claim of unconstitutionality under the United States Constitution. The jurisdictional problem arises out of the enactments governing Alaska's accession to statehood, specifically, in relation to the Constitution of the new State and to the state and federal laws governing the termination of the former territorial courts and their displacement by a new state judicial system and a Federal District Court for the District of Alaska. The State Constitution, which took effect "immediately upon the admission of Alaska into the Union as a state" (Art. XV, § 25) on January 3, 1959, provided for a Supreme Court, to "be the highest court of the State, with final appellate jurisdiction," a superior court, and such other courts as the legislature may provide. Art. IV, §§ 1, 2. Article XV, § 17, provides that in the transitional period until the new courts were organized, "the judicial system shall remain as constituted on the date of admission . . ." and that "[w]hen the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law."

The Alaska Statehood Act, 72 Stat. 339, which also became fully effective on January 3, 1959, in §§ 13–17, made similar provision for the eventual disposition of business pending in the territorial district court upon the

organization of the new District Court for the District of Alaska. However, it too provided, in § 18, that "the United States District Court for the Territory of Alaska shall continue to function as heretofore" for three years, or until the President proclaims that the new District Court "is prepared to assume the functions imposed upon it." In June, 1959, when these actions were commenced, and on July 2, when decision below was rendered, neither new federal nor state courts were in operation.

The first question presented is whether the interim Alaskan District Court was the "court of a State" in deciding this case. Sections 12 to 18 of the Statehood Act, 72 Stat. 339, make it plain that the interim court was not intended to be the newly created United States District Court for the District of Alaska, 28 U. S. C. § 81A; otherwise the nature of the court, whether state or federal, is not explicitly set forth. It is apparent, however, that the court is to a significant degree the creature of two sovereigns acting cooperatively to accomplish the joint purpose of avoiding an interregnum in judicial administration in the transitional period. The termination of the existence of the interim court is governed by federal law, Statehood Act § 18; but the termination of its general jurisdiction over state law matters, insofar as it is dependent on state consent, is governed by Alaska law, c. 50, S. L. A. 1959, § 31 (2), which also provides for the accelerated organization of separate Alaska courts should the interim court be terminated before they are ready. C. 50, S. L. A. 1959, § 32 (4), added by 151 S. L. A. 1959, § 1.

To determine our jurisdiction we need not engage in abstract speculation as to the function of the interim court in cases not before us. Whether the court can serve as a federal court, and the permissible scope of its powers if it may so serve, cf. *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582; *Benner* v. *Porter*, 9 How. 235, are perplexing questions, decision of which

should not be avoidably made. It is apparent that the legislature of Alaska vested the judicial power of the State in the interim District Court for the time being, that the district judge in this case explicitly deemed himself to be exercising such power, and that, in light of the express consent of the United States, he properly did so. *Benner* v. *Porter, supra.* It follows that the District Court sat as a "court of a State" to decide this case.

The question remains whether the interim court was also the "highest court" of Alaska within the meaning of 28 U. S. C. § 1257. At the time of the filing of the notice of this appeal on August 6, 1959, the latest time at which jurisdiction could properly be determined, no new Alaska state court was in actual operation, although on July 29 the Justices of the Court were designated by the Governor. The contention that the interim court was not the highest court of Alaska at that time rests upon this latter fact, and the terms of c. 151, S. L. A. 1959, § 1, amending c. 50, S. L. A. 1959, § 32, which provides that in the event that "a court of competent jurisdiction, by final judgment, declares that the United States Court of Appeals for the Ninth Circuit lacks jurisdiction to hear appeals from the District Court of the District of Alaska, the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices of the supreme court and appeals from the District Court of the District of Alaska may be made to the State Supreme Court."

Because the Ninth Circuit had ruled against its appellate jurisdiction over the interim court on June 16, 1959, six days before this action was commenced, *Parker* v. *McCarrey,* 268 F. 2d 907, it is urged that this provision, preserving appeals from the District Court to the Supreme Court of the State until the creation of that court, requires the conclusion that at least after July 29, when the Justices were appointed, appellate review was sufficiently

guaranteed to make the Supreme Court, and not the District Court, the highest court of Alaska in which a decision in the instant case could be rendered.

The question thus raised is not free from doubt. Viewing the case as of August 6, when the notice of appeal was filed, it is fairly arguable that the preservation effected by c. 151, S. L. A. 1959, § 32 (4) of the right to appeal to the Supreme Court of Alaska constituted the interim court as a lower court of Alaska within the intent of 28 U. S. C. § 1257 to await the completion of the State's adjudicatory process as a prerequisite to adjudication here. Yet, were the promise of an appeal, however indefinitely postponed, to be taken as sufficient to bar our jurisdiction under § 1257, its equally obvious purpose to allow substantial constitutional questions to be timely brought here as of right would be frustrated. Although this case was decided below on July 2, 1959, the date set by Alaska statute for full organization of the state courts was not until January 3, 1962, c. 50, S. L. A. 1959, §§ 31 and 32 (4). If no other fact were present, a potential delay of two and one-half years before the organization of a court to hear the preserved appeal would in itself counsel a construction against denial of our jurisdiction. Here, however, two additional facts must be weighed: (1) the Justices of the Supreme Court were actually appointed on July 29, in pursuance of a direction to accelerate the organization of the court; and (2) the effective promulgation of the rules of the court (accomplished on October 5, 1959) and appointment of a clerk were in their hands. C. 50, S. L. A. 1959, § 32 (3). While in light of these facts the question is exceedingly nice, we do not think that the assurance of a timely appeal to a court not yet functioning was sufficiently definite when the appeals were here filed to constitute a bar to our jurisdiction under § 1257 (2).

The interim court sustained the validity of the Alaska statute banning fishing with traps, 17 S. L. A. 1959, as amended by 95 S. L. A. 1959, against the claim of overriding federal law under the Supremacy Clause. The claim was based on an asserted conflict between the statute and regulations of the Secretary of the Interior, 24 Fed. Reg. 2053–71, prohibiting trap fishing in Alaskan waters generally, but excepting the appellants, thereby granting them in effect a license to fish with traps. The authority under which the Secretary purported to act is the Act of 1924, 43 Stat. 464, as amended, 48 U. S. C. §§ 221, 222.

A question not free from doubt, to put it at its lowest, thus raised under the Supremacy Clause, is however entangled with questions of construction of Alaskan state statutes as well as of the Alaska Statehood Act, *supra.* Also in issue is the effect of provisions of a compact between Alaska and the United States which, it is urged, reserved exclusive regulatory powers over Indian fishing rights to the United States, 72 Stat. 339, and which, so construed, is assertedly unconstitutional because of its failure to accord to Alaska participation in the Union on an "equal footing" with the other States. The latter contention raises related questions of federal power under the Commerce Clause, Art. 1, § 8. While we have before us questions of federal law that are the concern of this Court, their consideration implicates antecedent questions of local law turning in part on appreciation of local economic and social considerations pertinent to the scope of the so-called police power reserved to the State, upon which it would be patently desirable to have the enlightenment which the now fully formed Alaska Supreme Court presumably could furnish.

The original Act prohibiting traps was amended by 95 S. L. A. 1959, § 1, so as to provide that it shall not be construed inconsistently with the compact, and if the

Alaska court determines as a matter of statutory construction that the compact was designed to leave with the United States, as to Indian fishing, the power it exercises under the White Act, a constitutional question now appearing on the horizon might disappear. Moreover, since questions are raised regarding the status of these two Indian communities in relation to the authority of the Secretary of the Interior, enlightenment drawn on the spot by the Alaska Supreme Court may be material to any ultimate determination of federal questions by this Court. Finally, since the ultimate challenge to this legislation is that it must yield to superior federal authority, an authoritative pronouncement by the Supreme Court of Alaska with regard to the justifications of this legislation under the so-called police power would have important bearing on the question of the scope of the powers reserved to the State.

Accordingly, consistently with the policies embodied in § 1257, and in view of the peculiar facts of this case, we refrain at this stage from deciding the issues presented on the merits of this appeal so as to afford the Alaska Supreme Court the opportunity to rule on questions open to it for decision. We assume that that court has jurisdiction in these cases. However, since it alone can authoritatively decide such a question, we hold the cases on our docket. After the Alaska Supreme Court's decision, there may be further proceedings on this appeal; and if it assumes jurisdiction, a further appeal may be taken from its judgment. Cf. *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45.

Because of the nature of the asserted claim of federal right and the irreparable nature of the injury which may flow from the enforcement of these Alaska criminal statutes prior to a final determination of the merits, we

continue the stay granted by MR. JUSTICE BRENNAN on July 11, 1959, until the final disposition of the cases.

Having been advised that appeals in these cases are pending in the Alaska Supreme Court, we direct appellants to pursue those appeals for disposition not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent from remitting the parties to the Alaska Supreme Court, as they are of the view that the controlling questions are federal ones whose resolution is for this Court.

SUPREME COURT OF THE UNITED STATES

No. 2.—October Term, 1961.

Metlakatla Indian Community, Annette Island Reserve, Appellant, v. William A. Egan, Governor of the State of Alaska, and the State of Alaska.	On Appeal From the Supreme Court of the State of Alaska.

[March 5, 1962.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an appeal from a decision of the Supreme Court of the State of Alaska, — Alaska —, 362 P. 2d 901, affirming the denial of an injunction against interference by the State with appellant's use of fish-traps in the Annette Islands of southeastern Alaska. Appellant rests its claim in part on regulations promulgated by the Secretary of the Interior whereby the Metlakatla Indian Community was accorded the right to erect and to operate salmon traps at four locations in waters surrounding the Annette Islands, which Congress set aside for its use in 1891. Alaska challenged this authorization by a state conservation law forbidding the use of salmon traps.

Long before the white man came to Alaska, the annual migrations of salmon from the sea into Alaska's rivers to spawn served as a food supply for the natives. Commercial salmon fishing has become vital for Alaska's economy, but its exploitation seriously threatened the resource even before the turn of the century. See Gruening, The State of Alaska (1954), pp. 75, 97. Congress in 1889, in 1896, in 1906, and again in 1924 enacted conservation measures, prohibiting any obstruction of waters to impede salmon

migration, limiting the times and means of taking salmon, and authorizing the appropriate department to impose further restrictions.[1] When Alaska was established as a State, Congress withheld jurisdiction over her fisheries until she had made adequate provision for their administration.[2]

Equally with Congress, Alaska has been concerned with the evils of overexploitation. In particular she saw a menace in the fish-trap, a labor-saving but costly device, which became in her eyes the symbol of exploitation of her resources by "Stateside" colonialism. See Rogers, Alaska in Transition (1960), pp. 4–15; Gruening, *supra*, at pp. 392–407; Gruening, Let Us End American Colonialism (1955), reprinted at 103 Cong. Rec. 470, 474. The fish-trap, "a formidable structure," *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 87, consists principally of a fence or netting stretched across or partly across a stream to obstruct the upstream progress of the salmon and turn the fish into the "heart" or "pot" of the trap, where they are imprisoned until removed. See Rogers, *supra*, at p. 7; Gruening, The State of Alaska, *supra*, at pp. 169–170. At one time there were about 700 salmon traps in operation in Alaska. The Secretary of the Interior felt that the fish-trap's threat to conservation could be adequately dealt with by regulating the number of fish permitted to escape.[3] Alaska vigorously opposed this. The Territorial Legisla-

[1] 25 Stat. 1009; 29 Stat. 316 (Treasury Department); 34 Stat. 478, now 48 U. S. C. §§ 230–239, 241–242 (Commerce Department); 43 Stat. 464, now 48 U. S. C. §§ 221–228 (Commerce Department). The Secretary of the Interior succeeded to these responsibilities in 1939. 1939 Reorganization Plan No. II, § 4 (e), 53 Stat. 1431, 1433.

[2] 72 Stat. 339, 340–341. Alaska adopted a comprehensive fish and game code April 17, 1959, Alaska Laws 1959, c. 94, and received full control over her resources soon afterward.

[3] Letter of Douglas McKay, Secretary of the Interior, to Herbert C. Bonner, Chairman, House Comm. on Merchant Marine & Fisheries, Oct. 7, 1955.

ture several times sent memorials to Congress urging abolition of trap-fishing.[4] An ordinance to abolish all commercial traps was approved by Alaska voters along with the proposed State Constitution in 1956, and in early 1959 the first State Legislature turned this ordinance into the statute here under review.[5]

The Metlakatla Indians, some 800, led by a British missionary, moved from British Columbia to Alaska in 1887. In 1891 the Annette Islands, south of Ketchikan at the extreme lower end of the Alaskan archipelago, were "set apart as a reservation" by Congress for the Metlakatlans and other Indians, "to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior." 26 Stat. 1095, 1101, 48 U. S. C. § 358. In 1915 the Secretary issued regulations, 25 CFR (1939 ed.), pt. 1, establishing an elective council to make local ordinances for Metlakatla, and also permitting members of the Community to obtain permits for the use of salmon traps in waters adjacent to the Annette Islands. The next year, in fur-

[4] Alaska Laws 1931, p. 275; 1947, pp. 325–326; 1953, pp. 401–402; 1955, pp. 447–448.

[5] Alaska Laws 1959, c. 17. As amended by *id.*, c. 95, the statute reads as follows:

"Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; provided nothing in this section shall prevent the operation of small hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally operated in or above the mouth of any stream or river in Alaska; nor shall this Act be construed so as to violate Sec. 4 of Public Law 85–508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives."

therance of the Secretary's plan to establish a salmon cannery at Metlakatla, President Wilson by proclamation declared the waters within 3,000 feet of certain of these islands to be a part of the Metlakatla Reserve, to be used by the Indians as a source of supply for the intended cannery, "under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce." 39 Stat. 1777.[6] In 1918, without reference to the proclamation, this Court upheld the right of the Metlakatlans to exclude others from the waters surrounding their islands on the ground that these waters were included within the original reservation by Congress. *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78.

Ever since 1915, Metlakatla has operated fish traps with the consent of the Secretary of the Interior. Following the enactment of the State's fish-trap law in 1959, the Secretary in the exercise of his transitional power over Alaska fisheries banned all fish-traps except those operated by Metlakatla and by other Indians involved in the companion case, *Organized Village of Kake* v. *Egan*, *post*, p. ——. 24 Fed. Reg. 2053, 2056, 2069 (1959). The following year, having relinquished general control of the fisheries, the Secretary again authorized Metlakatla to operate fish-traps at four of eight specified locations, citing as authority the White Act, 43 Stat. 464, as amended, 48 U. S. C. §§ 221–228, and § 4 of the Alaska Statehood Act, 72 Stat. 339, 340, as amended by 73 Stat. 141. 25 CFR (1961 Supp.), pt. 88.[7]

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[6] In 1934, when the Metlakatlans were made citizens, Congress declared that reservations made for them by statute, order, or proclamation should "continue in full force and effect," 48 Stat. 667.

[7] Since 1944 Metlakatla has been a chartered federal corporation under a constitution adopted pursuant to the Wheeler-Howard Act, 48 Stat. 984, 988, as amended, 49 Stat. 1250, 25 U. S. C. §§ 473a, 476, 477.

With this background we reach the present controversy. In May, 1959, just before the salmon season began, the State warned Metlakatla and other Indians that she would enforce the fish-trap law against them. The threat was intensified when the State arrested members of other Indian communities and seized one fish-trap. Suits were thereupon filed by Metlakatla and by the appellants in the companion case in the interim United States District Court for the District of Alaska, seeking an injunction against interference with their asserted federal rights to fish with traps. All complaints were dismissed, 18 Alaska —, 174 F. Supp. 500. Appeal was brought to this Court, as the Supreme Court of Alaska had not yet been fully organized. Pending decision, MR. JUSTICE BRENNAN granted a stay of enforcement by the State, 4 L. Ed. 2d 34, 80 S. Ct. 33. The Court assumed jurisdiction and continued the stay but remanded the case to the newly constituted State Supreme Court primarily for its disposition of matters of local law, 363 U. S. 555. That Court affirmed the District Court's dismissal, holding the fish-trap law applicable to Metlakatla and to the other appellants, and upholding its validity as so applied, — Alaska —, 362 P. 2d 901. From its judgment, the appeal is properly here under 28 U. S. C. § 1257. We noted probable jurisdiction, 368 U. S. 886.

Several grounds of the decision below are now out of the case on concession of error by Alaska, but she firmly stands on the judgment in her favor. Metlakatla argues that it is immune from the fish-trap law because (1) state law cannot regulate Indian activities on Indian reservations; (2) the State cannot regulate a federal instrumentality; and (3) appellant has been authorized to operate traps by the Secretary of the Interior. The United States has supported Metlakatla as *amicus curiae*, see 362 U. S. 967.

The Indians of southeastern Alaska, who have very substantially adopted and been adopted by the white man's civilization, were never in the hostile and isolated position of many tribes in other States. As early as 1886 a federal judge, holding Alaskan Indians subject to the Thirteenth Amendment, denied that the principle of Indian national sovereignty enunciated in *Worcester* v. *Georgia*, 6 Pet. 515, applied to them. *In re Sah Quah*, 31 F. 327 (D. Alaska). There were no Indian wars in Alaska, although on at least one occasion, see Gruening, The State of Alaska (1954), pp. 36–37, there were fears of an uprising. There was never an attempt in Alaska to isolate Indians on reservations. Very few were ever created, and the purpose of these, in contrast to many in other States, was not to confine the Indians for the protection of the white settlers but to safeguard the Indians against exploitation. Alaskan Indians are now voting citizens, some of whom occupy prominent public office in the state government. See *United States* v. *Booth*, 161 F. Supp. 269 (D. Alaska 1958); *United States* v. *Libby, McNeil & Libby*, 107 F. Supp. 697, 699 (D. Alaska 1952). Metlakatlans, the State tells us, have always paid state taxes, in contrast to the practice described and prescribed for other reservations in *The Kansas Indians*, 5 Wall. 737, and it has always been assumed that the reservation is subject to state laws. *United States* v. *Booth, supra*, 161 F. Supp., at 270. Congress in 1936, 49 Stat. 1250, 48 U. S. C. § 358a, by authorizing the Secretary of the Interior to create Indian reservations of land reserved for Indian uses under 48 U. S. C. § 358, seems to have believed that Metlakatla was no ordinary reservation, since Metlakatla alone is covered in § 358. Finally, in *United States* v. *Booth, supra*, the District Court for Alaska held that a crime committed on the Metlakatla Reserve, before the extension of jurisdiction over Indian

country to Alaska, see p. 11, *infra*, was punishable under territorial laws, since for the reasons here outlined the Reserve was not "Indian country" within the meaning of 18 U. S. C. §§ 1151–1153.

The words "set apart as a reservation," appearing in the statute creating the Annette Island Reserve, are substantially the same as used in numerous other statutory reservations. *E. g.*, 13 Stat. 63 (Uinta Valley, Utah); 13 Stat. 541, 559 (Colorado River); 18 Stat. 28 (Gros Ventre and others); 19 Stat. 28, 29 (Pawnee). None of these statutes made express provision for self-government or for state government. Some treaties, such as that with the Cherokees in 1828, 7 Stat. 311, expressly excluded state laws. Other treaties, however, while sometimes phrased in terms of a gift or assignment rather than a reservation of land, made no mention of state power. *E. g.*, Treaty with the Shawnee Tribe, 1825, 7 Stat. 284; Treaty with the Potawatomies, 1837, 7 Stat. 532; Treaty with the New York Indians, 1838, 7 Stat. 550, 551; Treaty with the Sacs and Foxes, 1842, 7 Stat. 596. Later treaties "set apart for the absolute and undisturbed use and occupation" of the Indians certain lands. *E. g.*, Treaty with the Arapahoes and Cheyennes, 1867, 15 Stat. 593, 594; Treaty with the Crow Indians, 1868, 15 Stat. 649, 650. The 1868 Treaty with the Navajos was similar. 15 Stat. 667, 668. And the 1855 treaty with the Quinault Indian Tribe, 12 Stat. 971, which the Supreme Court of Washington held barred state regulation of reservation fishing, promised only that lands would be "reserved, for the use and occupation of the tribes." It was implemented by an executive order of November 7, 1873, by which certain lands were "withdrawn from sale and set apart for the use" of the tribe. See *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 657–658, 294 P. 557.

The provision creating the Metlakatla reserve in 1891 was added to a House bill dealing with timber lands on the floor of the Senate by Nebraska's Senator Manderson. Reciting the unfortunate experience of the Metlakatlans in British Columbia and their emigration to Alaska, Senator Manderson explained that his amendment was designed to dispel fears of expulsion from their new lands as from their old, or of intrusion by outsiders seeking to exploit the resources of the islands. The purpose, he stated, was "simply to allow this band of Indians to remain there under such rules and regulations as the Secretary of the Interior may impose, and give them some recognized footing at that place." Remarks by Senators Dawes and Dolph were to the same effect. 21 Cong. Rec. 10092–10093 (1890). The amendment was agreed to and adopted by both Houses after a conference, with no further discussion.

This provision subjecting Metlakatla to rules and regulations of the Secretary of the Interior is unusual. Since 1849 the Secretary had been the officer of the United States charged with administration of the Indian laws, but none of the treaties or statutes which have come to our attention contained such a provision. The Cheyenne and Crow treaties, *supra,* provided that Congress might regulate matters on the reservations, but this was no delegation of Congress' powers to the Secretary. It was but a recognition by the Indians of powers the Constitution gave to the national legislature.

The regulations issued by the Secretary for the government of the Annette Islands January 28, 1915, appear to be without parallel. No such rules applying to other reservations are to be found in the Code of Federal Regulations. The Secretary vested powers of local government in an elective council, 25 CFR (1939 ed.), § 1.2, which was given authority to pass ordinances required not

to conflict with "the laws of the United States, the laws of the Territory of Alaska, or the rules and regulations in this part," § 1.10, and subject to review by the Secretary, § 1.62. As a condition to the right to vote in local elections members of the Reserve—limited to Metlakatlans and other natives, § 1.51—were required to swear obedience to local laws, laws of the United States, and laws of the Territory of Alaska, § 1.52. Thus the Secretary, in the exercise of the authority delegated him by Congress, subjected self-government of Metlakatla not only to federal oversight but to territorial laws as well. However, as discussed above, an additional regulation issued by the Secretary in 1915 authorized the use of fish-traps at Metlakatla, and this permission has been continued in regulations issued since statehood.

Alaska urges that the regulations are invalid because neither the White Act nor the Statehood Act conferred authority on the Secretary to permit Metlakatlans to use fish-traps. The State's premise is correct, *Organized Village of Kake* v. *Egan*, *post*, p. ——. However, Congress in 1891 gave the Secretary authority to make rules governing the Metlakatla reservation, and his authority, like the reservation itself, *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, extended to the waters surrounding the islands. Does this Act validate the regulations in light of subsequent legislative and executive actions?

The Presidential Proclamation of 1916, 39 Stat. 1777, declared waters within 3000 feet of Annette and adjacent islands to be a part of the Metlakatla Reservation and provided that the Indians should have the use of these waters "under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce." Alaska argues that the purpose of this provision was to place Metlakatla fishermen in the same position as all others in Alaska by subjecting them to the same

laws. In 1916 the general laws were federal; now they are those of the State. Therefore, the State contends, the policy of the Proclamation requires that the provision be construed as subjecting the Metlakatlans to the laws governing all other fishermen, which now include the state fish-trap law. The Metlakatlans have the right to exclude others from their waters, Alaska agrees, but not the right to be free from regulation.

Alaska does not argue that the Proclamation deprived the Secretary of the Interior of the authority Congress gave him to prescribe rules governing fishing and other activities on the Annette Islands. Assuming the President had power to do so, he did not purport to exercise it. Quite the contrary. The Proclamation recites that the Secretary has determined to establish a cannery for the Metlakatlans, that the Secretary has been given authority to make regulations for Metlakatla by the statute of 1891, and that protection of the Indians' fishing rights is required to assure a supply of fish for the cannery. Apparently the Proclamation was prompted by the threatened encroachment of non-Indian fishermen into Metlakatla waters and the fear that the reservation of the islands might not protect the Indians against such intrusions. No statutory authority for the Proclamation was cited. It was declared to be issued under authority of "the laws of the United States." It is clear that President Wilson was attempting to assist and promote the plans of the Secretary of the Interior to develop the reserve under his statutory authority, not to limit or destroy that authority. The subjection of Metlakatla to general fisheries laws and to regulations of the Secretary of Commerce thus did not make those laws and regulations superior to regulations of the Secretary of the Interior. Rather the general laws and Commerce regulations were adopted as a part of the Interior regulations, so far as not in conflict with other

rules adopted by the Secretary of the Interior, and subject to his further modification under the power given him in 1891.

Nor did the White Act impair the Secretary's power. That statute permitted the Secretary for conservation purposes to limit the taking of salmon in areas of his designation, but prohibited his granting exclusive rights in so doing. This Court in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, held that the prohibition bars the Secretary from creating exclusive White Act rights in Indians as well as in non-Indians, but it expressly disclaimed holding that no exclusive Indian rights may exist. 337 U. S., at 118–119, 122–123. The Secretary's regulations did not create exclusivity; that was a part of the reservation as created in 1891 and clarified by the proclamation of 1916, which excluded others from fishing in Metlakatla waters.

In 1958, 72 Stat. 545, Alaska was added to the list of States and Territories permitted to exercise civil and criminal jurisdiction over Indian reservations. The State has not argued that this took away the power of the Secretary of the Interior to make regulations contrary to state law. Appellant has argued, to the contrary, that the statute expressly preserved Indian fishing rights from state laws. The statute granting States civil and criminal jurisdiction was passed in 1953, 67 Stat. 588, 18 U. S. C. § 1162, 28 U. S. C. § 1360. Subsection (b) of that statute provides that nothing therein shall authorize alienation, encumbrance, or taxation of Indian property, "or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect

to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

This statute expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation, but only those fishing rights and privileges given by federal treaty, agreement, or statute. It might plausibly be argued, therefore, that fishing rights given by regulation are not protected and state jurisdiction is established. Legislative history is silent as to the interpretation of the provision. See H. R. Rep. No. 848, 83d Cong., 1st Sess.; S. Rep. No. 699, 83d Cong., 1st Sess.; 99 Cong. Rec. 9962, 10782, 10928 (1953). The apparent purpose of the proviso was to preserve federally granted fishing rights. It would be sheer speculation to attribute significance to the imperfect parallelism of the provisions protecting property and fishing rights in the absence of any suggested reason for excluding fishing rights based on regulations. The process of statutory drafting and evolution, here veiled from scrutiny, is too imprecise to permit such an inference. Cf. *United States* v. *Mersky*, 361 U. S. 431, 437. In any event, the proviso also protects rights given the Indians by statute respecting the control and regulation of fishing, and the 1891 statute gave the Metlakatlans the right to fish under regulations of the Secretary of the Interior.

Section 6 (e) of the Alaska Statehood Act, 72 Stat. 339, 340–341, providing for the conveyance of United States properties "used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska," contemplated transfer to the State of the same measure of administration and jurisdiction over fisheries and wildlife as possessed by other States, S. Rep. No. 1929, 81st Cong., 2d Sess. (1950) 13–14; H. R. Rep. No. 1731, 80th Cong., 2d Sess. (1948) 1; S. Rep. No. 1028, 83d Cong., 2d Sess. (1954) 31; S. Rep. No. 1163, 85th Cong., 1st

Sess. (1957) 3, see *Geer* v. *Connecticut*, 161 U. S. 519, after the transition period during which the State was to establish machinery for this purpose. Section 4, however, as amended by 73 Stat. 141, required Alaska to disclaim all right and title to any United States property not granted her by the statute, and also "to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives." Such property was to "be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe," with immaterial exceptions, and provided that claims against the United States are neither enlarged, diminished, nor recognized by these provisions. This disclaimer is substantially the same as found in the acts admitting 13 other States. See S. Rep. No. 315, 82d Cong., 1st Sess. (1951) 15.

Alaska does not expressly argue that the Secretary's power was destroyed by the Statehood Act. She does, however, contend that control of all fishing was transferred to the State with no exception for Indian fishing, and that only the exclusiveness of Metlakatla's fishing rights was preserved. But legislative history makes clear that the transfer of jurisdiction over fishing was subject to rights reserved in § 4. S. Rep. No. 1929, 81st Cong., 2d Sess. (1950) 2.

Clearly this section does not protect only "recognized" Indian rights—those the taking of which would be compensable by the United States. Committee reports demonstrate the aim of Congress to preserve the status quo as to a broader class of "right," including, in the case of land, mere possession or occupancy. Compensation was an issue Congress took pains to avoid. See H. R. Rep.

No. 1731, 80th Cong., 2d Sess. (1948) 15; H. R. Rep. No. 255, 81st Cong., 1st. Sess. (1949) 13; S. Rep. No. 1028, 83d Cong., 2d Sess. (1954) 4, 29–30; S. Rep. No. 1163, 85th Cong., 1st Sess. (1957) 15. We need not here explore the remoter reaches of this protection. The Metlakatla reservation was Indian property within § 4. Whether or not the "absolute jurisdiction" retained by the United States in § 4 is exclusive of state authority, see *Organized Village of Kake* v. *Egan*, *post*, p. ——, the statute clearly preserves federal authority over the reservation. Federal authority was lodged in the Secretary in 1891, and it was not dislodged by the Statehood Act.

However, in issuing the present regulations the Secretary relied not on the 1891 statute but on the White Act and the Statehood Act, neither of which authorized his action. In a letter to the Solicitor General, filed by the United States as an Appendix to its brief as *amicus curiae*, the Secretary left no doubt that in issuing the regulations he acted under compulsion of what he conceived to be his duty under the Statehood Act to preserve the *status quo*. He deemed himself, as it were, to be a mere automaton. The exercise of any authority that the Secretary has under the reservation statute to allow fish-traps necessarily involves his judgment on a complex of facts, his evaluation of the relative weights of the Indians' need for traps and of the impact of traps at Metlakatla on the State's interest in conservation. We cannot make this determination for him.

The appropriate course is to vacate the judgment of the Supreme Court of Alaska and remand the case there to be held to give ample opportunity for the Secretary of the Interior with all reasonable expedition to determine, prior to the 1963 salmon fishing season, what, if any, authority he chooses to exercise in light of this opinion. Should the Secretary fail so to act, the parties may apply to the Alaska court for further proceedings not inconsistent with

this opinion. See *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 618–619. The stay granted by MR. JUSTICE BRENNAN, and continued by the Court, will remain in force until the end of the 1962 salmon fishing season, as defined in the regulations issued by the Secretary of the Interior.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1961.

Organized Village of Kake, and Angoon Community Association, Appellants, *v.* William A. Egan, Governor of Alaska.	On Appeal From the Supreme Court of the State of Alaska.

[March 5, 1962.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is a companion case to No. 2, *Metlakatla Indian Community* v. *Egan, ante,* p. —, but calls for separate treatment. Appellants seek the reversal of a decision of the Supreme Court of Alaska, — Alaska —, 362 P. 2d 901, affirming the dismissal of their petitions for injunctions against interference with their operation of fish-traps in southeastern Alaska.

The Organized Village of Kake and the Angoon Community Association are corporations chartered under the Wheeler-Howard Act of 1934, 48 Stat, 984, 988, as amended, 49 Stat. 1250 (1936), 25 U. S. C. §§ 473a, 476, 477. Kake is located on Kupreanof Island, 100 miles south of Juneau. Angoon is located on Admiralty Island, 60 miles south of Juneau. They are occupied by Thlinget or Tlinget Indians, native to Alaska.

Both communities are entirely dependent upon salmon fishing. In pursuance of a policy to create a sound fishing economy for the two groups, the United States purchased canneries and related properties for Angoon in 1948 and for Kake in 1950. Since these dates appellants have operated fish-traps at specified locations in nearby waters, under permits granted by the Army Engineers to

erect traps in navigible waters and by the United States Forest Service to anchor them in the Tongass National Forest. In March 1959 the Secretary of the Interior, by regulations issued under authority of the White Act, 43 Stat. 464, as amended, 48 U. S. C. §§ 221–228, and the Alaska Statehood Act, 72 Stat. 339, permitted Angoon to operate three fish-traps during the 1959 season and Kake four. 24 Fed. Reg. 2053, 2069. The following year the Secretary authorized permanent operation of these trap-sites and specified one additional site for Angoon and five more for Kake for possible future authorization. 25 CFR (1961 Supp.) pt. 88.

The history of this litigation is recited in *Metlakatla Indian Community* v. *Egan*, *supra*. It is sufficient to note here that Alaska in 1959 threatened to enforce against Kake and Angoon her anti-fish-trap conservation law, Alaska Laws 1959, c. 17, as amended by *id.*, c. 95; that the State seized one fish-trap at Kake, arrested the President of the Kake Village Council and the foreman of the crew attempting to moor the trap, and filed informations against them; that suit was filed by both Kake and Angoon in the interim United States District Court for Alaska to enjoin this interference with their claimed fishing rights; and that the dismissal of both complaints was affirmed by the Supreme Court of Alaska.

The situation here differs from that of the Metlakatlans in that neither Kake nor Angoon has been provided with a reservation and in that there is no statutory authority under which the Secretary of the Interior might permit either to operate fish-traps contrary to state law. Appellants do not rely heavily on the Secretary's regulations. Neither the White Act nor the Statehood Act, cited by the Secretary, supports a grant of immunity from state law. The White Act was a conservation and anti-monopoly measure. It authorized the Secretary to limit fishing times, places, and equipment in

order to conserve fish but forbade him in so doing to create exclusive rights, even in Indians. *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 122–123. Because the rights claimed are exclusive in the Kakes and Angoons, they cannot have been created pursuant to the White Act, even though that statute now applies, if at all, only to Indians. Moreover, the White Act gives the Secretary power only to limit fishing, not to grant rights. The Statehood Act retained "absolute jurisdiction and control" of Indian "property (including fishing rights)," in the United States, but it did not give powers of the nature claimed to the Secretary of the Interior. No other source of authority appears available. The provisions now found in 25 U. S. C. §§ 2 and 9, referring to the President's power to prescribe regulations for effectuating statutes "relating to Indian affairs," to settle accounts of "Indian affairs," and concerning "the management of all Indian affairs and of all matters arising out of Indian relations," derive from statutes of 1832 and 1834, 4 Stat. 564 and 4 Stat. 735, 738. In keeping with the policy of almost total tribal self-government prevailing when these statutes were passed, see pp. 11–12, *infra*, the Interior Department itself is of the opinion that the sole authority conferred by the first of these is that to implement specific laws, and by the second that over relations between the United States and the Indians—not a general power to make rules governing Indian conduct. United States Department of the Interior, Federal Indian Law (1958), pp. 54–55; Cohen, Handbook of Federal Indian Law (1941), p. 102. We agree that they do not support the fish-trap regulations.

Both communities operate their traps under permits granted by the Army Corps of Engineers and by the United States Forest Service. But neither of these permits grants a right to be free of state regulation or prohibition. Like a certification by the Interstate Commerce Commission, each is simply acknowledment that

the activity does not violate federal law, and not an exemption from state licensing or police power requirements. Cf. *Maurer* v. *Hamilton*, 309 U. S. 598; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177. The Engineers have no objection under the Rivers and Harbors Act, 30 Stat. 1121, 1151, 33 U. S. C. § 403, to the obstruction of navigable streams incident to the operation of fish-traps at Kake and Angoon; the Forest Service has no objection to the use of National Forest land to anchor them. Neither attempted to exempt these traps from state law.

As in the companion case, certain grounds relied on by the Alaska court are no longer urged by the State. The principal dispute now concerns the meaning of § 4 of the Statehood Act, in which the State disclaimed all right and title to and the United States retained "absolute jurisdiction and control" over, *inter alia*, "any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives."

The United States in its brief *amicus curiae* contended that the reservation of absolute jurisdiction over Indian "property (including fishing rights)" ousted the State from any regulation of fishing by Indians in Alaska. Appellants urge that Congress intended to protect the Indians in their freedom to continue fishing as they had done before statehood, so that Alaska cannot interfere with the Indian fishing actually practiced at that time. They argue in addition that in using fish-traps they were exercising an aboriginal right to fish that was protected by § 4. The court below concluded that aboriginal rights of Alaskan natives have been extinguished, that appellants have no rights not enjoyed in common with all other Alaskans, and that § 4 protects only exclusive rights given Indians by federal law.

The United States wisely abandoned its position that Alaska has disclaimed the power to legislate with respect to any fishing activities of Indians in the State. Legislative history reveals no such intention in Congress, which was concerned with the protection of certain Indian claims in existence at the time of statehood. See, *e. g.*, Hearings Before House Committee on Interior and Insular Affairs on H. R. 2535 and related bills, 84th Cong., 1st Sess. (1955) 124–131, 266–267, 381–383. But we cannot accept Alaska's contention that Indian "property (including fishing rights)" refers only to property owned by or held for Indians under provisions of federal law. Section 4 must be construed in light of the circumstances of its formulation and enactment. See *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 87. Congress was aware that few such rights existed in Alaska. Its concern was to preserve the status quo with respect to aboriginal and possessory Indian claims, so that statehood would neither extinguish them nor recognize them as compensable. See, *e. g.*, House Hearings, *supra* (1955), 130, 384 (Delegate Bartlett); Hearings Before Senate Committee on Interior and Insular Affairs on S. 50, 83d Cong., 2d Sess. (1954) 227, (Senator Jackson), 260–261.[1]

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[1] In 1948 a statehood bill requiring disclaimer of "all lands . . . owned or held by any . . . natives, the right or title to which shall have been acquired through or from the United States or any prior sovereignty," was favorably reported with this explanation:

"As proposed to be amended, this paragraph would preserve all existing valid native property rights in Alaska, including those derived from use or occupancy, together with all existing authority of the Congress to provide for the determination, perfection or relinquishment of native property rights in Alaska. It would neither add to nor subtract from such rights and such authority, but would simply maintain the status quo." H. R. Rep. No. 1731, 80th Cong. 2d Sess. (1948) 15.

To the same effect, see H. R. Rep. No. 255, 81st Cong. 1st Sess. (1949) 13.

Discussion during hearings on the 1955 House bill affords further evidence that claims not based on federal law are included. Section 205 of that bill (like § 6 of the bill as enacted) authorized Alaska to select large tracts of United States land for transfer to state ownership. It was understood that the disclaimer provision left the State free to choose Indian "property" if it desired, but that such a taking would leave unimpaired the Indians' right to sue the United States for any compensation that might later be established to be due. See House Hearings, *supra* (1955), 135 (Delegate Bartlett). Feeling that experience had shown this procedure too slow to give prompt relief to the Indians, Oklahoma's Representative Edmondson proposed to exempt Indian property from the State's selection. *Id.*, at 381. This was rejected as virtually destroying Alaska's right to select lands. For, although Representative Edmondson pointed out that the disclaimer extended only to property owned by Indians or held in trust for them, four representatives clearly stated their belief that the disclaimer included not just the few Alaska reservations but also the aboriginal or other unproved claims in dispute, which covered most if not all of Alaska. *Id.*, at 383 (Representatives Engle, Dawson, Metcalf, Westland).

"Fishing rights" first appeared in a Senate bill reported in 1951, S. Rep. No. 315, 82d Cong., 1st Sess. 2. Earlier bills had mentioned only land. The fishing rights provision is unique to Alaska, although the disclaimer is in other respects the same as in earlier statutes. See pp. 7–8, *infra*. It was included because fishing rights are of vital importance to Indians in Alaska. House Hearings, *supra* (1955), 125 (Delegate Bartlett). The existence of aboriginal fishing rights was affirmed by the Interior Department's Solicitor in 1942, 57 I. D. 461. There was almost no discussion of "fishing rights" in Congress. In earlier hearings the Senate Committee were considering a sug-

gestion by Senator Cordon that all Indian property be granted to the State, reserving the right to seek federal compensation, except for property actually occupied by Indians. Asked to describe Indian possessory rights, Governor Heintzleman portrayed a smokehouse beside a stream, 50 miles from the town where they live, visited for fishing purposes perhaps two weeks each year. Senate Hearings, *supra* (1954), 137.

On a similar basis the Kakes and the Angoons have fished at the disputed locations since 1948 and 1950. It appears to be Alaskan custom that, although traps are taken from the water and replaced each year, one does not "jump" a trap-site. The prior claim of the first trapper is respected. See *United States* v. *Libby, McNeil & Libby,* 107 F. Supp. 697, 700 (D. Alaska 1952); Gruening, The State of Alaska (1954), p. 171; 57 I. D. 461, 462 (1942). The Statehood Act by no means makes any claim of appellants to fishing rights compensable against the United States; neither does it extinguish such claims. The disclaimer was intended to preserve unimpaired the right of any Indian claimant to assert his claim, whether based on federal law, aboriginal right, or simply occupancy, against the Government. Appellants' claims are "property (including fishing rights)" within § 4.

Because § 4 of the Statehood Act provides that Indian "property (including fishing rights)" shall not only be disclaimed by the State as a proprietary matter but also "shall be and remain under the absolute jurisdiction and control of the United States," the parties have proceeded on the assumption that if Kake and Angoon are found to possess "fishing rights" within the meaning of this section the State cannot apply her law. Consequently argument has centered upon whether appellants have any such "rights."

The assumption is erroneous. Although the reference to fishing rights is unique, the retention of "absolute"

federal jurisdiction over Indian lands adopts the formula of nine prior statehood acts. Indian lands in Arizona remained "under the absolute jurisdiction and control" of the United States, 36 Stat. 557, 569; yet in *Williams* v. *Lee*, 358 U. S. 217, 220, 223, we declared that the test of whether a state law could be applied on Indian reservations there was whether the application of that law would interfere with reservation self-government. The identical language appears in Montana's admission act, 25 Stat. 676, 677, yet in *Draper* v. *United States*, 164 U. S. 240, the Court held that a non-Indian who was accused of murdering another non-Indian on a Montana reservation could be prosecuted only in the state courts. The Montana statute applies also to North Dakota, South Dakota, and Washington. Identical provisions are found in the acts admitting New Mexico (36 Stat. 557, 558–559) and Utah (28 Stat. 107, 108), and in the Constitutions of Idaho (1890, Art. 21, § 19) and Wyoming (1890, Art. 21, § 26), which were ratified by Congress (26 Stat. 215 (Idaho); 26 Stat. 222 (Wyoming)).

Draper and *Williams* indicate that "absolute" federal jurisdiction is not invariably exclusive jurisdiction. The momentum of substantially identical past admission legislation touching Indians carries the settled meaning governing the jurisdiction of States over Indian property to the Alaska Statehood Act in light of its legislative history.

Section 4 of the Statehood Act contains three provisions relating to Indian property. The State must disclaim right and title to such property; the United States retains "absolute jurisdiction and control" over it; the State may not tax it. On the urging of the Interior Department that Alaska be dealt with as had other States, these provisions replaced an earlier section granting to the State all lands not actually possessed and used by the United States. Hearings Before a Subcommittee

of the House Committee on Public Lands on H. R. 206 and H. R. 1808, 80th Cong., 1st Sess. (1947) 2, 12, 14. The first and third provisions have nothing to do with this case; the second does not exclude state conservation laws from appellants' fish-traps.

The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest. It was determined, after some debate, to be the best way of ensuring that statehood would neither extinguish nor establish claims by Indians against the United States. If lands subject to the claim of Indian rights were transferred to the State, the Indians were not thereby to lose the right to make claims against the United States for damages. See Senate Hearings, *supra* (1954), 286.

The provision for "absolute jurisdiction and control" received little attention in Congress. In the 1954 Senate hearings the Committee were considering a provision copied from the Oklahoma statute that Indian lands should remain "subject to the jurisdiction, disposal, and control of the United States." Mr. Barney, on behalf of the Justice Department, urged the inclusion of such a provision in order to avoid the possibility that, under *United States* v. *McBratney*, 104 U. S. 621, federal criminal jurisdiction over Indian reservations might be extinguished by statehood. Senators Barrett and Jackson thereupon expressed the clear desire that federal jurisdiction not be made exclusive over all disclaimed areas. Mr. Barney denied that the provision would deprive the State of "political jurisdiction" over disclaimed properties. Senator Cordon declared:

> "The State may well waive its claim to any right or title to the lands and still have all of its political or police power with respect to the actions of people on those lands, as long as that does not affect the title to the land."

Senator Jackson said: "All that you are doing here is a disclaimer of proprietary interest," and Mr. Barney agreed. Senator Cordon said:

> "The act of admission gives to the State of Alaska political jurisdiction, including all that is meant by the term 'police power,' within its boundaries unless there be express or definitely implied, which is the same thing, a reservation of exclusive jurisdiction in the United States."

Senators Barrett and Jackson and Mr. Barney agreed. Mr. Slaughter of the Interior Department pointed out that a later section of the bill, now § 10, provided for "exclusive" federal jurisdiction over Mt. McKinley National Park. Mr. Barney, in answer to a direct question, stated that "jurisdiction" in the Oklahoma statute and in his proposal for Indian property did not mean exclusive jurisdiction. Senate Hearings, *supra* (1954), 283–287. The bill as reported contained no provision on jurisdiction but only a disclaimer of right an title, a reservation of federal power to extinguish Indian claims as if there had been no statehood act, and an exemption from state taxation. *Id.*, at 331. Provisions retaining federal "jurisdiction" and "absolute jurisdiction" were considered interchangeable by at least one committee, which reported the disclaimer in an Alaska bill as "almost identical" with those in the preceding 13 admission acts. S. Rep. No. 315, 82d Cong., 1st Sess. (1951) 15.

Most statehood bills contained the more common phrasing "absolute jurisdiction and control" rather than the Oklahoma phrase. Although this was the usual language employed to retain federal power in statehood acts, the Senate Committee in 1958 out of an abundance of caution deleted the word "jurisdiction" in order that no one might construe the statute as abolishing state power

entirely. The Committee declared that it was not its intention by the retention of federal control to make the Alaska situation any different from that prevailing in other States as to state jurisdiction over Indian lands. S. Rep. No. 1163, 85th Cong., 1st Sess. (1957) 15. The House bill, which retained the usual langauge, was passed first, 104 Cong. Rec. 9756, and the Senate made no amendments to the House bill because it feared that statehood might be lost once again if the House had to act on a conference report. 104 Cong. Rec. 12009–12010. Senator Jackson stated that "the differences are of wording and language rather than policy . . . . designed to define more clearly some of the jurisdictional problems involved . . . . The objective of both bills is identical. There is strong evidence that the end product of both bills would be identical." The Senate amendment was designed simply to make clear what an examination of past statutes and decisions makes clear also: that the words "absolute jurisdiction and control" are not intended to oust the State completely from regulation of Indian "property (including fishing rights)." "Absolute" in § 4 carried the gloss of its predecessor statutes, meaning undiminished, not exclusive. Cf. *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 47–48. The power of Alaska over Indians, except as granted by Congress in 1958, 72 Stat. 545, is the same as that of many other States.

The relation between the Indians and the States has by no means remained constant since the days of John Marshall. In the early years, as the white man pressed against Indians in the eastern part of the continent, it was the policy of the United States to isolate the tribes on territories of their own beyond the Mississippi, where they were quite free to govern themselves. The 1828 treaty with the Cherokee Nation, 7 Stat. 311, guaranteed the

Indians their lands would never be subjected to the jurisdiction of any State or Territory. Even the federal Government itself asserted its power over these reservations only to punish crimes committed by or against non-Indians. 1 Stat. 469, 470; 2 Stat. 139. See 18 U. S. C. § 1152.

As the United States spread westward, it became evident that there was no place where the Indians could be forever isolated. In recognition of this fact the United States began to consider the Indians less as foreign nations and more as a part of our country. In 1871 the power to make treaties with Indian tribes was abolished, 16 Stat. 544, 566, 25 U. S. C. § 71. In 1887 Congress passed the General Allotment Act, 24 Stat. 388, as amended, 25 U. S. C. § 331–358, authorizing the division of reservation land among individual Indians with a view toward their eventual assimilation into our society. In 1885, departing from the decision in *Ex parte Crow Dog*, 109 U. S. 556, Congress intruded upon reservation self-government to extend federal criminal law over several specified crimes committed by one Indian against another on Indian land, 23 Stat. 362, 385, as amended, 18 U. S. C. § 1153; *United States* v. *Kagama*, 118 U. S. 375. Other offenses remained matters for the tribe, *United States* v. *Quiver*, 241 U. S. 602.

The general notion drawn from Chief Justice Marshall's opinion in *Worcester* v. *Georgia*, 6 Pet. 515, 561; *The Kansas Indians*, 5 Wall. 737, 755–757; and *The New York Indians*, 5 Wall. 761, that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdic-

tion except as forbidden by federal law, *Utah & Northern R. Co.* v. *Fisher*, 116 U. S. 28, 31. In *Langford* v. *Monteith*, 102 U. S. 145, the Court held that process might be served within a reservation for a suit in territorial court between two non-Indians. In *United States* v. *McBratney*, 104 U. S. 621, and *Draper* v. *United States*, 164 U. S. 240, the Court held that murder of one non-Indian by another on a reservation was a matter for state law.[2]

The policy of assimilation was reversed abruptly in 1934. A great many allottees of reservation lands had sold them and disposed of the proceeds. Further allotments were prohibited in order to safeguard remaining Indian properties. The Secretary of the Interior was authorized to create new reservations and to add lands to existing ones. Tribes were permitted to become chartered federal corporations with powers to manage their affairs, and to organize and adopt constitutions for their own self-government. 48 Stat. 984, 986, 987, 988. These provisions were soon extended to Alaska, 49 Stat. 1250.

Concurrently the influence of state law increased rather than decreased. As the result of a report making unfavorable comparisons between Indian Service activities and those of the States, Congress in 1929 authorized the States to enforce sanitation and quarantine laws on Indian reservations, to make inspections for health and educational purposes, and to enforce compulsory school attendance. 45 Stat. 1185, as amended, 25 U. S. C. § 231. See Meriam, Problem of Indian Administration (1928); H. R. Rep. No. 2135, 70th Cong., 2d Sess. (1929); Cohen, Handbook of Federal Indian Law (1941), p. 83; United States Depart-

[2] *Fisher* permitted a territorial tax on a railway through Indian country, and one basis for the holding was that here discussed. The alternative ground was that the railway right-of-way had been withdrawn from the reservation, as was held in *Maricopa & Phoenix R. Co.* v. *Arizona Territory*, 156 U. S. 347.

ment of the Interior, Federal Indian Law (1958), pp. 126–127. In 1934 Congress authorized the Secretary of the Interior to enter into contracts with States for the extension of educational, medical, agricultural, and welfare assistance to reservations, 48 Stat. 596, 25 U. S. C. § 452. During the 1940's several States were permitted to assert criminal jurisdiction, and sometimes civil jurisdiction as well, over certain Indian reservations. *E. g.*, 62 Stat. 1161; 62 Stat. 1224; 64 Stat. 845; 63 Stat. 705. A new shift in policy toward termination of federal responsibility and assimilation of reservation Indians resulted in the abolition of several reservations during the 1950's. *E. g.*, 68 Stat. 250 (Menominees); 68 Stat. 718 (Klamaths).

In 1953 Congress granted to several States full civil and criminal jurisdiction over Indian reservations, consenting to the assumption of such jurisdiction by any additional States making adequate provision for this in the future. 67 Stat. 588, 18 U. S. C. § 1360, 25 U. S. C. § 1162. Alaska was added to the list of such States in 1958, 72 Stat. 545. This statute disclaims the intention to permit States to interfere with federally granted fishing privileges or uses of property. Finally, the sale of liquor on reservations has been permitted subject to state law, on consent of the tribe itself. 67 Stat. 586, 18 U. S. C. § 1161. Thus Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall.

Decisions of this Court are few as to the power of the States when not granted Congressional authority to regulate matters affecting Indians. In *Thomas* v. *Gay*, 169 U. S. 264, an Oklahoma territorial tax on the cattle of non-Indian lessees of reservation land was upheld on the authority of the *Fisher* and *Maricopa* decisions, *supra*, which permitted taxation of railroad rights of way. The Court conceded that because the lands on which the taxed

cattle grazed were leased from Indians the tax might, in contrast to the railroad cases, have an indirect effect on Indians, but that effect was declared to be too remote to require a contrary result. In the latest decision, *Williams* v. *Lee*, 358 U. S. 217, we held that Arizona had no jurisdiction over a civil action brought by a non-Indian against an Indian for the price of goods sold the latter on the Navajo Reservation. The applicability of state law, we there said, depends upon "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them," 358 U. S., at 220. Another recent statement of the governing principle was made in a decision reaffirming the authority of a State to punish crimes committed by non-Indians against non-Indians on reservations: "In the absence of a limiting treaty obligation or Congressional enactment each State had a right to exercise jurisdiction over Indian reservations within its boundaries," *New York ex rel. Ray* v. *Martin*, 326 U. S. 496, 499.

These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. Congress has gone even further with respect to Alaska reservations, 72 Stat. 545, 18 U. S. C. § 1162, 28 U. S. C. § 1360. State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation. It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country. See Cohen, Indian Rights and the Federal Courts, 24 Minn. L. Rev. 145, 153 (1940), citing *Pablo* v. *People*, 23 Colo. 134, 46 P. 636. Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward* v. *Race Horse*, 163 U. S. 504; *Tulee* v. *Washington*,

315 U. S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* to fishing within a reservation, *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 P. 557; *Moore* v. *United States*, 157 F. 2d 760, 765 (C. A. 9th Cir.). See *State* v. *Cooney*, 77 Minn. 518, 80 N. W. 696.

True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams* v. *Lee*. Nor have appellants any fishing rights derived from federal laws. This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy. Because of the migratory habits of salmon, fish-traps at Kake and Angoon are no merely local matter.

Congress has neither authorized the use of fish-traps at Kake and Angoon nor empowered the Secretary of the Interior to do so. The judgment of the Supreme Court of Alaska is affirmed. However, in view of all the circumstances and in order to avoid hardship, the stay granted by MR. JUSTICE BRENNAN, and continued by the Court, will remain in force until the end of the 1962 salmon fishing season, as defined in the regulations issued by the Secretary of the Interior.

It is so ordered.

MR. JUSTICE DOUGLAS, while joining the opinion of the Court, dissents from an extension of the stay for reasons to be stated in an opinion.

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1961.

Organized Village of Kake, and Angoon Community Association, Appellants, *v.* William A. Egan, Governor of Alaska.	On Appeal From the Supreme Court of the State of Alaska.

[March 19, 1962.]

Mr. Justice Douglas.

When the decision in this case was announced on March 5, 1962, I noted that while I joined the opinion of the Court, I dissented from the continuation of the stay and would elaborate my views at a later time. As the decision to extend the stay was reached in Conference on March 2, 1962, there was insufficient time to prepare an opinion by the following Monday.

The stay was first granted by Mr. Justice Brennan, 80 Sup. Ct. 33, to maintain the *status quo* while this litigation was pending. The stay was then plainly justified, as the questions presented were substantial ones. Now, however, the adjudication has been made; and the Court is unanimous in concluding that these Indians have no right to use fish traps. A stay is not needed to protect rights that may arise from future Regulations as in the *Metlakatla* case, for any administrative power of the Secretary of the Interior to allow the Kake and Angoon Indians to use traps is lacking. And with all deference, a stay is not shown to be justified on any other grounds.

A stay that continues in use for another season a device as nefarious as the fish trap needs potent reasons.

The destruction caused by fish traps is notorious. Mr. Justice Van Devanter, conservationist as well as jurist, described an Alaskan fish trap [1] designed "to catch about 600,000 salmon in a single season," a trap which "will tend materially to reduce the natural supply of fish accessible to the Indians." *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 87. Dr. David Starr Jordan in his 1904 report of the Alaska Salmon Commission stated, "If we consider the ultimate interests of Alaska and the permanence of her salmon fisheries, no traps should be allowed anywhere. . . ." Gruening, The State of Alaska (1954), p. 169. Beginning in 1931 the Territorial Legislature memorialized Congress condemning the use of the fish trap because of its adverse effect on salmon and on the salmon industry. See Alaska, Sess. Laws, 1931, p. 275; Alaska, Sess, Laws, 1953, pp. 401–402; Alaska, Sess. Laws, 1955, pp. 447–448. The 1955 Resolution ended by saying:

> "WHEREAS, the vast majority of Alaskans, after many decades of first hand experience and study, are con-

[1] The salmon trap is described by the Alaska Supreme Court as follows:

"A trap consists of tall stakes or mechanically driven piling extending from the shore to varying distances seaward, depending on the depth of the water. Wire or webbing is stretched across the stakes or piling from the shore to the seaward end and from the ocean bottom upward to a point above high water. Located at the seaward end is an extended wing or hook and an opening into the heart and pot. When the webbing is on the ocean bottom fish cannot pass around the trap at the shoreward end. One tendency of migrating fish is to parallel the shoreline and travel with the incoming tide. Fish stopped by the webbing of a trap will eventually follow it seaward in an attempt to by-pass the obstruction. The wing or hook is constructed so as to discourage by-passing and divert the fish into the heart and pot where they remain. With some variations in construction, floating traps adapted to deep water are commonly used and are highly productive." *Metlakatla Indian Community* v. *Egan,* — Alaska —; 362 P. 2d 901, 903.

vinced that no salmon conservation program can achieve lasting effect unless salmon fish traps are abolished immediately, forever, from Alaskan waters;

. . . . .

"Now THEREFORE, your Memorialist, the Legislature of the Territory of Alaska, respectfully urges and requests that immediate legislation be enacted abolishing fish traps from the waters of the Territory of Alaska."

In 1959, the Alaskan Native Brotherhood, organized to speak for the Indians [2] reiterated its stand "for complete abolition of traps."

Senator Gruening, on March 6, 1962, issued a statement to the Associated Press which emphasized another invidious effect of the use of fish traps by the Indians:

"The 1945 Alaska Territorial Legislature, at my behest, while I was Governor, passed on Act outlawing discrimination in public establishments based on race, creed, or color. This was designed to safeguard Alaska's Native people who had been subject to such discrimination and it did so safeguard them. Secretary Seaton's action would have created an inverse discrimination against Whites deeply sowing see'ds of bitterness and arousing interracial friction and antagonism which has no place in America and had disappeared in Alaska. The performance was an inexcusable pressure play. In a referendum on fish traps in 1948, 88.7% of the people of Alaska voted for trap abolition, and Angoon's vote was 49 to 9 and Kake's 123 to 6 against traps. Yet Secretary Seaton sought to force traps upon them and on the people of Alaska.

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[2] See Federal Indian Law (Dept. of Interior, 1958), p. 963.

"The Court's decision in the Metlakatla case differs in its conclusion from the Kake and Angoon cases only because of Metlakatla's historically different and unique legal status. It leaves the course of action open to the present Secretary of Interior. It is to be hoped that both he and the people of Metlakatla, who in the 1948 referendum—though owning seven traps—voted 112 to 33 for trap abolition, will agree that privilege and discrimination based on race and should finally disappear totally from the 49th State."

The devastating effect of fish traps upon Alaska's economy was described by the Alaska Supreme Court:

"It has not been unusual for a single trap to catch as many as 600,000 fish in a single season. The impact of the catch of eleven traps on the fisheries of southeastern Alaska is considerable from the point of view of conservation. The season's catch of a gill net or purse seine fisherman in the same area might run from 2,000 to 10,000 fish respectively. The discrimination against all fishermen, natives and whites alike, resulting from the Secretary's 1959 regulation, creates social problems for the state which it is powerless to remedy if the Secretary's claimed right is upheld. The intention to retain such a power over the basic industry of the state was not intimated in the wording of the Alaska Statehood Act, much less described. Such a power has never been reserved as to any other state admitted into the Union as far as this court is aware. The fisheries of Alaska, although pitifully depleted, are still its basic industry. The economy of the entire state is affected, in one degree or another, by the plentitude of the salmon in a given season. The preservation of this natural resources

is vital to the state and of great importance to the nation as a whole." *Metlakatla Indian Community* v. *Egan*, — Alaska —; 362 P. 2d 901, 915.

The fish trap is "efficient," [3] an adjective which, by conservation standards, means that it is "destructive." As Senator Gruening has said, "Its economic and social aspects have been under unceasing attack by virtually all fishermen, by cannery men who do not own or control traps and have to depend on other types of gear for their salmon, and by the Alaska public generally." Gruening, The State of Alaska (1954), pp. 170–171.

Moreover, the fish trap is not a selective device, taking only one type of fish. It catches everything that swims; and fish that are not "in season" are as irretrievably lost as are those in which the fishermen have the greatest interest.

We should not allow such a destructive device [4] to be employed, absent a claim of legal right or a showing of imperative need. As I have said, no such right exists

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[3] Those who defend the fish trap rate it as being a degree better than the purse seine. This is because the purse seine is movable and "difficult to keep track of by the inspectors," while the fish trap is stationary and can be readily inspected. See Hearings before Subcommittee, Senate Committee on Fisheries on S. 5856, 62d Cong., 2d Sess., pp. 458–459.

[4] Those who defend the fish trap are quick to add "provided the trap has no jigger." Hearings, *supra*, note 3, at 458. Senator Gruening describes the "jigger":

"The 'jigger' is a lateral extension of the trap, curved or hooked, extending away from the wall of the outer 'heart' into the direction from which the salmon come. It makes avoidance of the trap toward which at that point the salmon are heading almost impossible." Gruening, The State of Alaska (1954), p. 170.

It is significant that the Regulations under which these Indians are now allowed to fish during the 1962 season do not bar the "jigger" (see 25 CFR § 88.3), though the Territorial Legislature as early as 1913 had banned it. See Gruening, *op. cit.*, *supra*, at 169.

subsequent to our unanimous decision of March 5, 1962. It is, of course, provided in 28 U. S. C. § 2106 that in disposing of cases here for review we may not only "affirm, modify, vacate, set aside or reverse," but also "require such further proceedings to be had as may be just under the circumstances." But we have no reason for concluding that it would be unjust to turn these Indians to fishing with gill nets or hand lines like everyone else. All we have before us is a motion made in October 1961 to expedite a hearing in these cases. In that motion it is said:

> "The 1962 fishing season in Alaska begins in July, 1962. To prepare for this fishing season, Appellants must commit large sums of money for materials and supplies, including wire, netting, and cannery equipment. A large portion of these materials must be ordered not later than January, 1962. If Appellants' right to fish with traps were not to be upheld, their investment would be wasted. Conversely, if Appellants' right to fish with traps is upheld, Appellants will be unable to fish unless substantial sums of money are committed early in 1962."

Whether any sums have in fact been committed to the construction of these nefarious fish traps we do not know. Why these Indians cannot fish in the manner of all other fishermen is not apparent. Since the fishing season starts in July, they have four months from the date of our decision to prepare for it. What problems, if any, they may have in fishing without traps, we do not know. They have asked for no stay at this juncture of the litigation. We act gratuitously and without any knowledge of the actual facts. We in effect dispense to this group who have no legal rights a *largesse*, as if we sat as a Commission on Indian Affairs, giving a part of the public domain to this favored few.

Those who know the story of the decline of the salmon [5] can only look with concern on any action that further depletes the supply of this choice national asset. Severe human hardship may result from the decision we handed down on March 5, 1962. But if that is true, we should

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[5] James Wickersham, delegate in Congress from Alaska, testified in 1914 as to the start of the depletion of the salmon:

"I want to call the attention of the committee to one stream which has been depleted in California, and that is the Sacramento River. The Sacramento River was one of the first rivers upon which canners put up salmon. In 1864 the first canned salmon were packed in California on the Sacramento River. In 1882 there were 200,000 cases of canned salmon put out from the Sacramento River—48 pounds to the case, making a total of 4,800 tons of salmon canned during that year on the Sacramento River.

"Then it began to decrease, and it went down to 123,000; then to 90,000; then to 57,000; then to 31,000; then to 14,000; and finally in 1906 there were none put up on that river. For three or four years there were none put up, but in 1913 there were 950 cases put up on the Sacramento River. In short, that great salmon stream has been utterly destroyed and there are no fish there now, substantially.

"Of course, that situation resulted from several causes. It resulted from overfishing, and from putting barriers across the streams to catch the fish, and it resulted in part from mining. All these things are going to happen in Alaska. There is mining going on there now on many of these streams. All the obstacles that operated to bring about that evil in the Sacramento River will operate in Alaska as soon as they open up that country. As soon as that is done and they get to work in there, the streams there are going to be depleted.

"When the first Russians went to Kadiak Island, more than a century ago, they found the Karluk salmon stream surrounded by Indians. It was a great fishing spot. That stream has probably turned out more canned salmon than any other stream in Alaska. Dr. Evermann and all those who were acquainted with it say it was the greatest salmon stream in the world. I saw the fishing going on there in 1903. I know how it was done. They had at one side a great post set in the ground sufficient to hold the nets. The nets were put into big boats, and they were long nets, some of them half a mile long, I suppose, and they were carried out into the bay, and as they came around they were fastened to a rope on the shore, to

require that it be shown. The disposition of these cases four months before the 1962 fishing season starts gives ample notice that new ways of earning a livelihood must be found other than the lazy man's device of the fish trap.[6]

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which was attached a big engine, and when they got that far along the big engine pulled the nets for them. The number of fish which they caught in there is simply unbelievable, and they were pulled in by machinery. The men themselves were unable to handle big nets of that kind. They were able to handle the small nets, but when they got machinery handling the fish for them they soon destroyed that stream. Every fisherman in that region knows it is destroyed; knows that the greatest salmon stream in Alaska has been destroyed." Hearings, House Committee on the Territories on H. R. 11740, 63d Cong., 2d Sess., pp. 45–46. For later discussions on the plight of the salmon of the Pacific, see Hearings, Merchant Marine and Fisheries Subcommittee, Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., on S. Con. Res. 35, pt. I, and on S. 502; Hearings, Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., on S. Con. Res. 35, S. 2586 and S. 1420, pt. II.

The depletion of salmon from California to Alaska is notorious. See Dufresne, Troubled River, Field and Stream, July 1959, p. 27; Netboy, Salmon of the Pacific Northwest (1958); 1958, A Year of Surprise in Pacific Salmon Canning, Pacific Fisherman, Jan. 25, 1959, p. 81; *id.*, Jan. 25, 1960, p. 53; *id.*, Jan. 25, 1961, pp. 13, 23; Van Fleet, The Vanishing Salmon, Atlantic, May 1961, pp. 48, 51.

"In my estimation, the former great wealth of the salmon fishery in California is doomed. In Oregon, the main runs are badly crippled but not entirely gone. In Washington, the runs are diminished along the coast and in the waters around Puget Sound, but careful husbandry could even bring about an increase. My advice to Alaska is to heed the lesson so well portrayed in the states to the south of it."

The Hearings, *supra*, on S. 502 are replete with examples of the impact on people and on the Alaska economy of the salmon depletion. This depletion also has a serious impact on wildlife. For an account of what a scarcity of salmon means to the brown bear population, see the Hearings, *supra*, on S. 502, at 25–26.

[6] "A trap fishes in the night when the man sleeps; it employs less men than the other kinds of gear; it is a labor-saving device. . . ." Hearings on S. 5856, *supra*, note 3, at 389.